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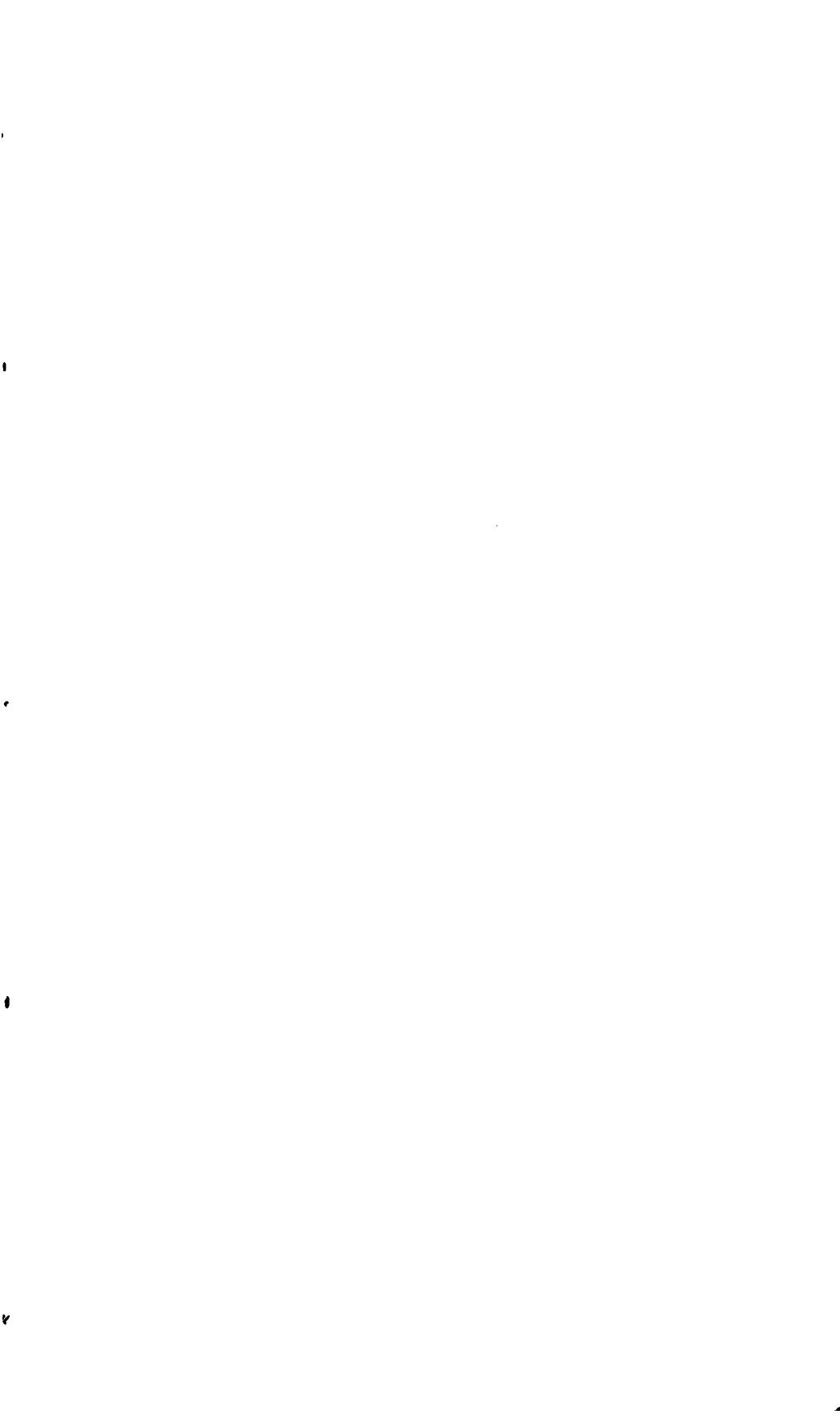
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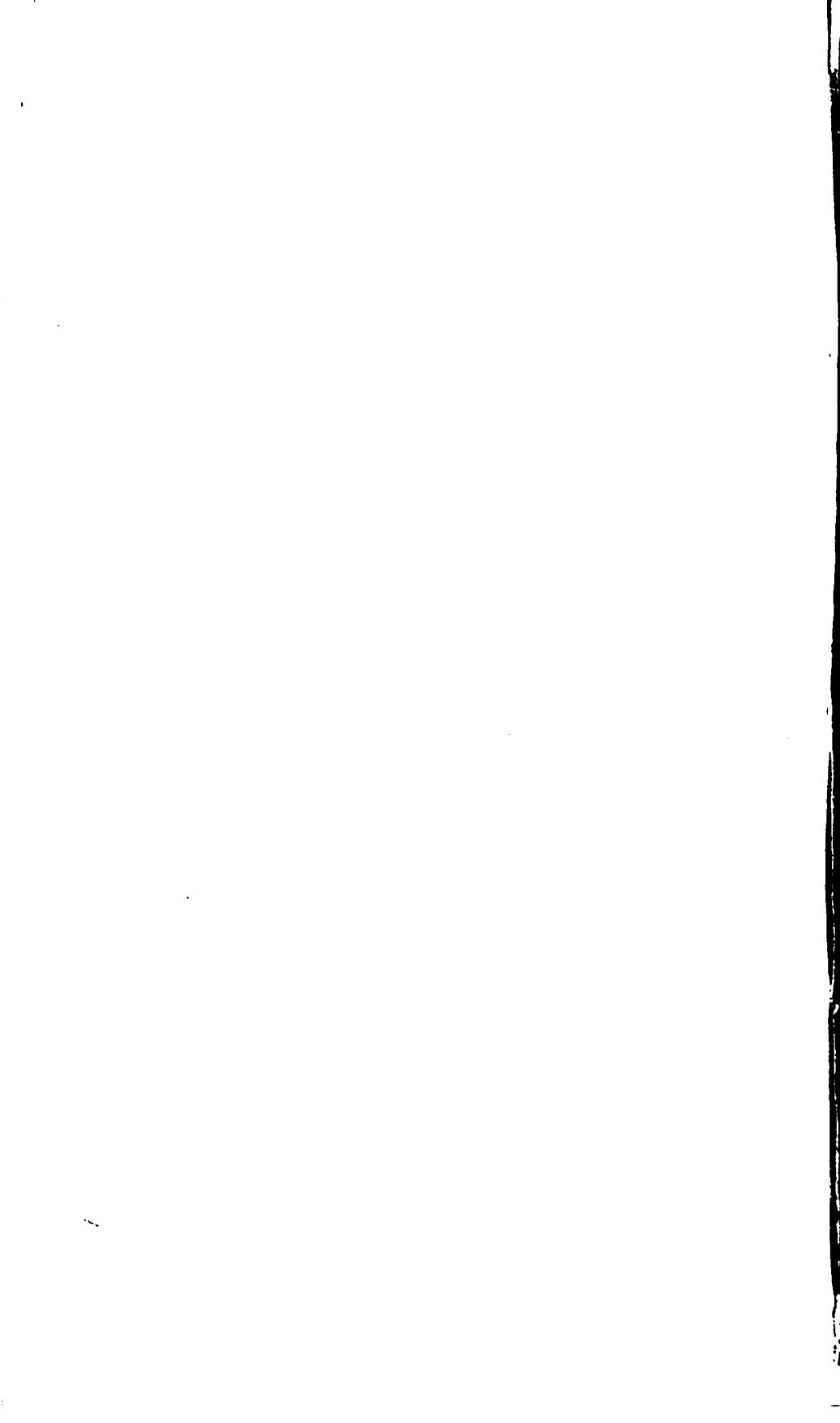
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PRACTICE REPORTS
IN THE
SUPREME COURT
AND
COURT OF APPEALS
OF THE
STATE OF NEW-YORK

BY NATHAN HOWARD, JR.,
COUNSELLOR-AT-LAW, NEW-YORK.



VOLUME XXVI.

ALBANY:

WILLIAM GOULD,
LAW BOOKSELLER AND PUBLISHER.
1864.

Entered according to Act of Congress, in the year eighteen hundred and sixty-three,
By NATHAN HOWARD, Jr.,
In the Clerk's Office of the District Court of the Southern District of New York.

Rec June 14. 1864

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PRACTICE REPORTS.

COURT OF APPEALS.

THE FARMERS' & MECHANICS' BANK OF KENT COUNTY, MARYLAND agt. THE BUTCHERS' & DROVERS' BANK.*

The party making and uttering a *certificate of "good,"* written upon the face of a *bank check* or other negotiable paper designed for circulation, stands in the relation of an *acceptor*, with all the responsibilities incident to that relation. The certificate means nothing less than this, but it means something more. It imports that the *drawer has funds*, or means convertible into funds, *in the hands of the drawee at the time*, which shall be retained and devoted to the payment of the paper on presentation.

A general and correct definition of the term "*agency*" implies the power to do just what the principal has authorized, and no more.

If the power to act is conferred by *writing*, then the instrument will define what the power is, and the extent of it; and if by *parol instructions* to do a particular act or series of acts relating to a particular business or subject, then the authority must be ascertained from the express instructions given, and such implied authority as may be necessary to give them effect.

If the agency arises, as it must in many cases, where there is no written authority, and no express parol instructions, from the relation which the agent maintains towards his principal, and the nature of the employment, it is obvious that the extent of the powers to bind the principal must depend upon other elements—such as the character of the relation; the nature of the employment; the custom and usage of the business; and the recognition and acquiescence; which must each of them, enter largely into the consideration of the extent of the agent's authority. And this principle is peculiarly applicable to the class of agencies represented by *the officers of corporate companies*.

* NOTE.—The doctrines of agency have recently been much discussed in our court of appeals, and one of the most instructive cases upon the duties of agents and the liabilities of principals for their acts, is that above entitled. It is reported in 16 *N. Y. R.* 125, where Judge SELDEN's opinion alone is given; but it appears by that report that Chief Judge DEXTER and Judge BROWN also delivered opinions. That of the Chief Judge will be found in 4 *Kern.* (14 *N. Y.*) *R.* 623; and as it seems desirable that the profession should be made acquainted with the views of the whole court in so leading a case, we here publish the opinion of Judge BROWN, which has been obtained from the reporter of the court of appeals, and is authentic.

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In determining the nature and extent of the authority which this latter class of agents may rightfully exercise, the courts may take judicial notice and recognize the general course of the *banking business* as it is now conducted, and the universal practice of those employed to conduct it. They may know that the circulating notes are signed by the presidents and cashiers; that the deposits are received and paid out by the clerks, tellers and cashiers; and the certificates of deposits, and the certificates upon the face of checks drawn by the dealers and depositors, are signed by the same class of officers, or by one of them.

The *authority* of this class of agents to do these acts within the walls of the banking institutions and at their counters, is *never the subject of inquiry or examination*. It is never doubted or questioned, but is *presumed* from the nature of the employment and the necessities of the business.

The rule that he who deals with the agent of another is bound to look into the agent's *commission* for the measure of his authority, must have a qualified application to an agent with a *general power, coupled with a limitation not patent or open to common observation*.

Therefore, where the *teller* or other proper officer of a banking corporation, representing it and doing its business at the counter, *certifies checks* of its dealers and depositors drawn upon it in the usual form under a *general power to certify*, such banking corporation is responsible to holders in good faith and for value, notwithstanding *private directions not to certify in the absence of funds without special permission*.

APPEAL from a judgment of the superior court of the city of New York. The action was to recover the amount of five checks drawn upon the defendant by one Green, and certified by the defendant's paying teller on their face to be good. The checks were not drawn against funds, and the teller, in fact, had no authority to certify such checks. The jury found that the plaintiffs were *bona fide* holders for value of the checks, and they had judgment for their amount. The defendants appealed to this court.

JOHN H. REYNOLDS, *for the appellants.*

HENRY A. CRAM, *for the respondents.*

BROWN J. The judge charged the jury, upon the trial of this action, that there was no doubt of the authority of Peck, the teller of the defendant, to certify checks in the manner in which the checks in question were certified, so as to bind the defendant to pay them to holders taking them *bona fide* and for value, in the usual course of business. The defendant thereupon excepted. The proposition involves

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the main question in the action, and I will return to it presently. He also charged, that if the jury found that the plaintiff had previously held similar checks certified by Peck, the teller, in the same manner as the checks in controversy, which had been paid by the bank on presentation and without objection, and if they also found that the plaintiff took them in good faith for value and without notice of the agreement between Green, the drawer, and Peck, the teller, that they were to be returned to and not paid by the bank, and without notice that Peck in certifying them had exceeded his authority, the plaintiff was entitled to recover. To this also the defendant excepted. The instruction was in effect that the jury might infer Peck's authority from previous transactions and acts of the same kind, which had been accepted and approved by the defendant without objection. In this I see no error, because the agent's authority might have been proved by an express direction, or by the usual and customary course of business at the bank. The residue of the proposition, that they must also be satisfied the plaintiff had no notice of the agreement between Peck and Green, or that the former accepted, in violation of his duty, before they could give the plaintiff a verdict, was certainly unexceptionable and needs no further notice. The jury were also told, and I think correctly, that the plaintiff was a holder for value, if it took the checks in payment and satisfaction of the installments of stock sold to or subscribed for by Green and others, and not as collateral security for the payment of such stock subscriptions. The verdict for the plaintiff must therefore be deemed to establish the facts, that the plaintiff took the checks in good faith, in the usual course of business, for value, and without notice of any want of authority by Peck, or of the agreement between him and Green, that the checks were not to be paid by the defendant. There is no conflict of evidence and no dispute about the facts. We are therefore left to consider whether Peck

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had authority under the proof to certify the checks for the bank, and if so what was the duty and obligation which it incurred thereby.

Checks upon banks have most of the qualities of inland bills of exchange. They are drawn for a sum certain upon a person or corporation usually having funds of the drawer sufficient for their payment, and are payable on presentation. If payable to bearer they pass by delivery, and if to the order of the payee by indorsement, in the usual form. They are not payable on time, and are therefore not presented for or subject to acceptance, and in this particular they differ from bills of exchange. The drawer may be made liable as the drawer of a bill of exchange upon presentation within a reasonable time and notice of non-payment. Most of the rules respecting bills of exchange and promissory notes affect checks on bankers. (*Chitty on Bills*, 515; *Harker* agt. *Anderson*, 21 *Wend.* 372). I assume that the practice of having the drawee mark and certify upon the face of the check, that it is good for the sum therein expressed, is of recent origin, for I find nothing said of it by the early writers, and but few reported cases where the practice is referred to. It is, however, at the present day a prevalent custom. Checks drawn upon banks or bankers thus marked and certified enter largely into the commercial and financial transactions of the country. They pass from hand to hand in the payment of debts, the purchase of property, and in the transfer of balances from one house and one bank to another. In the great commercial centers they make up no inconsiderable portion of the circulation, and thus perform a useful, valuable, nay, an almost indispensable office. They are enabled to perform these important functions, mainly upon the faith and credit given to the certificate of the drawee that they are good. It is this that gives them credit and currency with commercial men. The object of the drawer who obtains the certificate, and the purpose of the drawee in giving it, is to impart

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strength and credit to the paper, and to assure all who accept it in the course of trade, that it will be paid on presentation. The certificate is an undertaking—a contract—and in determining its legal effect we must ascertain, if we can, the intent of the parties; that is, the party who makes and the party who accepts it. The maker of the certificate puts his name to it with a view to its circulation, and to assure those to whom the paper may be offered, that it will be paid on presentation; and the party who accepts it does so upon the faith and credit of this representation and assurance. The paper upon which the certificate is impressed is negotiable by delivery, or by indorsement, and designed for circulation, and in respect to all the subsequent holders the party making and uttering the certificate stands in the position of an acceptor with all the responsibilities incident to that relation. The certificate means nothing less than this, but it means something more. It imports that the drawer has funds, or means convertible into funds, in the hands of the drawee at the time, which shall be retained and devoted to the payment of the paper on presentation. If it does not mean this, the certificate is a sham and a snare. The learned judge who delivered the opinion in *Massey agt. The Eagle Bank* (9 *Metcalf*, 309), says: "Unless the word good carries with it a binding evidence of the fact that the money is in the bank to meet that particular check, and that it will be paid to bearer at any time when presented, it is of no practicability." (*Vide also, Willetts agt. The Phoenix Bank*, 2 *Duer*, 121). This view leaves no doubt of the liability of the defendant to respond to the plaintiff for the amount of the checks, provided the certificates are its acts or made by its authority.

This brings me to consider what is doubtless the main question; that is, the authority of Peck, the teller, to make the certificates. He was an officer of the Butchers' and Drovers' Bank, a monied corporation with banking powers, and like all other corporate officers was, its servant and

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agent, having power to bind his principal within the scope of his authority. I shall not stop to distinguish between a general agent with power to act for and represent his principal in all his business transactions, and a special agent empowered to do a particular act or a series of acts in regard to a particular subject; nor between those agencies created by written instruments or express words, or those which arise by implication, from recognition, acquiescence or otherwise, because the power of a bank officer generally seems to be sufficiently well known, and the distinctions to which I refer are not material to the present inquiry. It is well, however, to notice that the term agency implies the power to do just what the principal has authorized, and no more, and this though a brief is quite a sensible definition. The difficulty mostly is to know what acts the principal has authorized, and what power is fairly within the terms of the commission, for when that is ascertained there is no longer any trouble in applying the rule. If the power to act is conferred by writing, then the instrument will define what the power is and the extent of it, and if by parol instructions to do a particular act or a series of acts relating to a particular business or subject, then the authority must be ascertained from the express instructions given, and such implied authority as may be necessary to give them effect. But if the agency arises—as it must in many cases—where there is no written authority and no express parol instructions, from the relation which the agent maintains towards his principal and the nature of the employment, it is obvious that the extent of the power to bind the principal must depend upon other elements than those to which I have referred. The character of the relation, the nature of the employment, the custom and usage of the business, the recognition and acquiescence, must each of them enter largely into the consideration of the extent of the agent's authority. These remarks are peculiarly applicable to the class of agencies represented by the officers of

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corporate companies. They are artificial creations and cannot think, act or speak for themselves. In all their communion and intercourse with the world, their officers must think, act and speak for them. The authority given to their officers is not contained in written instruments nor in express verbal instructions, but much of it must be implied from the nature of their business, its necessities, its customs and usages. It is well and wisely said in the *Mechanics' Bank* agt. *The New York and New Haven Railroad Co.* (3 *Kernan*, 599), that "whoever deals with a security of any kind, appearing on its face to be given by one man for another, is bound to inquire whether it has been given by due authority, and if he omits that inquiry he deals at his peril." The power to make the note or other security, or to execute the deed, release or other instrument, by one man for another, exists in some form where it can be submitted to the observation and inspection of the person dealing with the agent, and if he accepts the security or the instrument without examining the commission, he confides exclusively in the representations of the agent and must take upon himself the hazard. But in those innumerable agencies of which clerks, tellers, cashiers and other officers of corporations are examples, where the power and authority rests in usage, custom and necessity, and arises by implication, it is obvious the dealer cannot satisfy himself by examination and inquiry, because there is no written authority and no principal capable of speaking, and the inquiry can only be made and the answer obtained from the representative himself. In determining the nature and extent of the authority which this class of agents may rightfully exercise, there are some things of which the courts may take judicial notice. They must recognize, I think, the general course of the banking business as it is now conducted, and the universal practice of those employed to conduct it. They may know that the circulating notes are signed by the presidents and cashiers; that the

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deposits are received and paid out by the clerks, tellers and cashiers, and the certificates of deposits and the certificates upon the face of checks drawn by the dealers and depositors are signed by the same class of officers or by one of them. These duties make up a large part of the business daily transacted at every bank. The authority of this class of agents to do these acts within the walls of the banking institutions, and at their counters, is never the subject of enquiry or examination. It is never doubted or questioned, but is presumed from the nature of the employment and the necessities of the business.

The checks in controversy are dated on the 16th day of February, 1852, drawn and signed by T. A. C. Green, payable to the order of S. W. Spencer, cashier, directed to the Butchers' and Drovers' Bank, and certified as good for \$1,000, and signed under the certificate, R. Peck, teller. Both before and after the date of the checks, Green was a dealer and depositor of the bank, and had an account upon its books. In July, 1851, the plaintiff received a similar check from Green, certified in the same manner, for \$3,400, and in December of the same year a similar check certified in like manner for \$1,500, both of which were paid by the defendant to the plaintiff before the checks in controversy were received. Subsequently to the 16th February, 1852, and before the checks in question were presented for payment, Green deposited with the defendant, at various times and in various sums, \$6,000, which he drew out upon his certified checks. The proof showed that Peck had express authority to certify the checks of dealers, and he was furnished with a book in which he entered the checks so certified. Robert Buck, a witness in the employment of the defendant ten or fifteen years, testified: That "the paying teller was in the habit of certifying checks. They would be presented to pay debts and take up notes. They were substituted for bank bills. The teller would sometimes write good upon them, and sometimes merely his name. It

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was then charged in the certification book, and was considered as charged against the account of the person in whose favor it was certified. It is customary in some instances for the paying teller to certify checks of customers when they have no funds, if they have confidence in them." Jacob Ames, the president of the bank, testified: "We don't give our teller liberty to certify checks when the drawers have not sufficient funds in the bank, without special permission. I have told Peck to be careful not to certify checks unless the drawers had funds in the bank to cover them." This limitation upon the teller's authority not to certify unless the drawers have funds in the bank, or the bank has confidence in the drawers, according to the evidence of Buck, or not to certify in the absence of funds without special permission, is not very absolute or stringent. But give it all reasonable effect, and we cannot evade the force of these considerations. If the limitation is to be operative at all, it must operate to defeat every certificate made in the absence of funds. So that an error in making up the drawer's accounts or the omission of some subordinate clerk to charge a voucher previously received, would prove fatal to the validity of a certificate in the hands of an innocent holder for value. The limitation not to certify in the absence of funds, is not contained in any written instrument or resolution which may be seen and examined, but is a mere parol direction dependent upon the existence of a fact—the possession of funds—which cannot be known to those who accept the security upon the faith of the certificates.

The rule that he who deals with the agent of another is bound to look into the agent's commission for the measure of his authority, must have a qualified application to an agent with a general power coupled with a limitation not patent or open to common observation. Such a limitation, if it could operate, would be destructive of the power. Suppose that Spencer, to whose order these checks were

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payable, had desired to assure himself that Green had funds in the bank to cover them, of whom would he have made inquiry? Of the bank officers certainly, and they or one of them had already said that the checks were good for the sums expressed in them, and what could be said more? It is evident, therefore, that the limitation is inconsistent with the power, or at least deprives it of all practical value, because, as the checks would lose all credit and currency if their validity depended upon the existence of the funds required by the condition, the authority to certify would have no real value. Let us look at the subject in another aspect. The act of paying a dealer's check is an act of quite as much moment to the bank and may be subject to the same limitation as certifying the same check. Indeed we may safely assume that the teller of every bank has directions not to pay unless the drawer has funds. Now the officer by inadvertence or in the confidence that the drawer's account will be made good pays to a holder for value. He has clearly transgressed his directions. Can the bank repudiate the act of the officer and recover the money back upon the ground of want of power? The case of *Hull* agt. *The Bank of the State* (*Dudley's So. Car. Rep.* 259) is an authority against the recovery. The officer had general power to pay the checks of its dealers at its counter in the usual course of business, which he was in the daily habit of exercising, and that was enough to protect a holder for value to whom the check had been paid, notwithstanding the want of funds. Any other rule would destroy confidence and put the interests of those who deal with such institutions in constant peril.

There are several authorities much relied upon by the counsel for the defendant which I think right to notice. *Grant* agt. *Norway* (10 *Com. Bench*, 665) was a case where the master of a vessel in the East Indies had signed a bill of lading in the usual form, declaring that certain goods had been shipped on board his vessel, to be delivered in

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London to the order of Biale Kock & Co., their order or assigns, who afterwards indorsed it, for value received, to the plaintiffs. The goods in fact were never shipped, and the action was brought by the plaintiffs against the owners of the vessel for the injury they had sustained in giving credit to the bill. Bills of lading are regarded, in some sense, as negotiable instruments, and the right to the property mentioned in them passes by indorsement. In signing bills of lading the master acts for and has power to bind the owners. The sole question was, the liability of the owners upon the signature of the master. The court of common pleas held they were not liable. *Jervis, Ch. J.*, in delivering the judgment, says: "Is it usual, in the management of a ship carrying goods on freight, for the master to give a bill of lading for goods not put on board? For all parties concerned have a right to assume that an agent has authority to do all which is usual. The very nature of a bill of lading shows that it ought not to be signed until the goods are on board, for it begins by describing them as shipped." He concludes by observing that "the general usage gives notice to all people that the authority of the captain to give bills of lading is limited to such goods as have been put on board, and the party taking a bill of lading, either originally or by indorsement, for goods which have never been put on board, is bound to show some authority given to the master to sign it." *Coleman agt. Riches* (29 Eng. Law & Eq. R. 323) arose upon a receipt given for grain which had never been delivered, and is similar in principle. (*Vide also Hubbersly agt. Ward*, 8th *Exchequer*, 330). In the case of the *Schooner Freeman agt. Buckingham and others* (18 How. U. S. R. 182), the supreme court of the United States held the same opinion, and the reasons were assigned by Mr. Justice CURRIS, who says: The master "has an apparent authority, if the ship be a general one, to sign bills of lading for cargo actually shipped, and he has also authority to sign a bill of sale of

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the ship when in case of disaster the power of sale arises. But the authority in each case arises out of and depends upon a particular state of facts. It is not an unlimited authority in the one case or in the other, and his act in either case does not bind the owner, even in favor of an innocent purchaser, if the facts upon which the power depends did not exist. And it is incumbent upon those who are about to change their condition upon the faith of his authority, to ascertain the existence of all the facts upon which his authority depends."

I have extracted thus largely from these cases, because I desire it may be seen how little analogy there is between a bill of lading and a certified check designed to pass from hand to hand, and to some extent to supply the place of currency. The primary purpose of a bill of lading is to furnish written evidence that the goods have been actually put on board the vessel, with their quantity and marks, the name of the consignor and consignee, the places of departure and discharge, with the price of the freight, &c. And when it is said that a bill of lading passes by indorsement and delivery, it means that the indorsement and delivery of the bill transfers the property in the goods therein described (*3 Kent. Com.* 207), and not that it passes from one person to another as a chose in action for the payment of a sum certain. The master's connection with and power over the property, and to bind the owner in respect thereto, depends upon the fact of its being shipped; and persons intending to acquire title to it by indorsement and transfer of the bill, know, by the universal usage as well as by the terms of the bill, that the act of the master is of no force unless the goods have been put on board the vessel. *The North River Bank agt. Aymar* (*3 Hill*, 263) was also referred to on the argument. The defendants were executors of Pexcel Fowler, and were sued on certain promissory notes, some of which were signed by Jacob D. Fowler as follows: Pexcel Fowler, by Jacob D. Fowler, attorney;

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and others of them were indorsed in the same form. They were not made and indorsed in the business of the principal, but in that of David Rogers & Son; and it is worth while to notice that the written power under which Jacob D. Fowler acted was executed by Pexcel Fowler and left with the plaintiffs. The supreme court held the defendants liable, Ch. J. NELSON dissenting; and the ground of his dissent is given in the first paragraph of his opinion as follows: "The attorney's power was limited in express terms to the business of the principal, and the use of his name for the accommodation of D. Rogers & Son was without authority, and therefore void. The plaintiffs are, moreover, to be deemed cognizant of the special limitation contained in the letter of attorney, for it was deposited with them and remained in their possession to the time of discounting the notes in question; and even without this, as the notes were signed by an attorney, it was their duty to inquire into his authority." The judgment was reversed in the late court for the correction of errors, and nothing remains to show the grounds of the reversal. They could be none other, however, than those given in the dissenting opinion of Ch. J. NELSON. Now, I can perceive but little resemblance between the written authority which is open to inspection, to do an act or a series of acts in relation to the business of his principal, and the general unwritten authority of an officer of a banking incorporation representing and acting for his principal at its place of business, with the usual power to certify the checks of its dealers, coupled with private instructions not to certify in the absence of funds without special permission.

The defence in this action is not aided by the decision of this court in the *Mechanics' Bank* agt. *The N. Y. & New Haven Railroad Co.* I notice two of its leading principles: 1st. By the charter of the railroad company the capital was limited to \$3,000,000, divided into 30,000 shares of \$100 each. "The entire capital was represented in the

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franchises of the corporation, and the owner of each share was entitled to a fixed and unalterable proportion of that capital. And it follows that any attempt to create a greater number of shares, by the issue of additional certificates, is not only a violation of the organic law of the corporation, but a direct invasion of the contract between it and each holder of its original stock." 2d. The by-laws of the company declared that all transfers of stock should be made in the transfer book kept in the proper office, and when a certificate of stock should be issued the same should be surrendered prior to the transfer being made. All certificates had this condition written upon their face. "The bank, in making their loan to Kyle, took from him an assignment and power of attorney in blank, but paid no regard to the fundamental conditions on which alone a legal title to stock could be transferred. Of these conditions of course they had notice. The certificate was void in the hands of Kyle, because issued by an agent without authority, there being no surrender of a previous certificate and no transfer to him on the books of actual stock ; and this want of authority was known to him." I see no sort of resemblance between that case and the one now under consideration.

I therefore adopt the conclusion that where the teller or other proper officer of a banking corporation, representing it and doing its business at the counter, certifies the checks of its dealers and depositors drawn upon it in the usual form, under a general power to certify, such banking incorporation is responsible to holders in good faith and for value, notwithstanding private directions not to certify in the absence of funds without special permission.

The judgment should be affirmed.

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NEW YORK SUPERIOR COURT.

MARY JANE ROBBINS, administratrix, &c. of CHARLES A. ROBBINS, appellant agt. HENRY WELLS and JOHN BUTTERFIELD and others, doing business under the name of the American Express Company, respondents.

It seems, that where it appears on the face of the complaint that the plaintiff brings suit here as a *foreign administratrix*, and the defendant does not take the *objection by demurrer* to the plaintiff's legal capacity to sue, it is waived, under §§ 144, 1847 and 148 of the Code.

A *judgment dismissing the complaint* at the trial, solely on the ground that the plaintiff does not have legal capacity to sue, is not a *bar* to another action legally instituted by the plaintiff. But it is otherwise, if the judgment of dismissal is on the ground that the *action will not lie against the defendants*.

The mere leave to file a supplemental complaint by the representative of a deceased plaintiff, decides nothing as to the plaintiff's *rights*. But a judgment that the plaintiff in it have leave to prosecute the original action and succeed to all the rights of the first plaintiff, is a different matter. Where the court can see on the face of the supplemental complaint that the former action is fatally defective, it may refuse such judgment. Per ROBERTSON, J.

The *members* of a *joint stock company* cannot be sued *as such*, until after a suit has been brought against the association in the manner prescribed by the statute (3 R. S. 5th ed. 777, §§ 122, 125), and judgment obtained against it, and execution thereon has been issued and returned unsatisfied. That is, the remedy at law must be first fully exhausted against the association, before an action will lie against the individual members.

General Term, June, 1863.

Before Bosworth, Ch. J., ROBERTSON and BARBOUR, JJ.

THIS action was commenced in favor of Charles A. Robbins, against the defendants, to recover of them the value of certain goods, which it is claimed were delivered to the defendants, to be conveyed to Muscatine, in the state of Wisconsin. The defendants are claimed to be carriers of goods, and to be doing business under the name of the "American Express Company." Before the trial, Robbins the plaintiff died, and leave was obtained to file a supplemental complaint and to continue the action in the name of Mary Jane Robbins, the administratrix. Letters of administration had been issued to her in the state of Wisconsin.

Robbins *sgt.* Wells.

The defendants Wells and Butterfield, who only are served with process, answer jointly; and among other things deny that the trunk (alleged to contain the goods in question), in the complaint referred to, was delivered to them, but on the contrary aver that it was delivered to the "American Express Company," a joint stock association, which consisted of more than seven shareholders or associates, of which the defendants were two. The answer raises the objection that the shareholders cannot be sued, but that the action should in the first instance be brought against the association in the name of the president and treasurer.

Upon the trial it did appear that the American Express Company was a joint stock association, consisting of more than seven shareholders; and that the trunk alleged to contain the goods in question was delivered to the company for carriage, and not to the defendants Wells and Butterfield.

At the close of the plaintiff's case the defendants moved for a nonsuit and a dismissal of the plaintiff's complaint upon the grounds:

1. That the action is brought in the name of a foreign administratrix who can have no standing in the court, as no administration had been taken out in this state.
2. That the action should have been brought against the "American Express Company," and not against the shareholders.
3. That there was no evidence as to what goods were put in the package in question.

The learned judge, before whom the action was tried, granted the motion and dismissed the complaint, and an appeal was taken to the general term.

W. R. MARTIN, *for appellant.*

HOOPER C. VAN VORST, *for respondents.*

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Bosworth, Ch. Justice. The fact that the plaintiff is a foreign administratrix appears on the face of the supplemental complaint, and if that fact does not make the complaint one which fails to state facts constituting a cause of action, but on the contrary makes the case one in which the plaintiff has not legal capacity to sue, the defect is waived by the defendants' omission to demur. (*Code, § 144, sub. 2, and §§ 147 and 148*). Though a foreign administratrix, she might receive payment of this claim and give a valid release. (*Doolittle agt. Lewis, 7 J. Ch. R. 49*).

In chancery a probate taken out in this state at any time before the hearing, has been held an answer to the objection that a complainant is a foreign administratrix, the objection not having been taken in the pleading. (*Osgood agt. Franklin, 2 J. Ch. R. 18; Goodrich agt. Pentleton, 4 J. Ch. Rep. 551, 552; Doolittle agt. Lewis, 7 J. Ch. Rep. 51*). The omission to take out letters in this state is said, in *Doolittle agt. Lewis*, to be a formal defect; by which I understand it to be affirmed, that though necessary to clothe the party with a legal capacity to sue as a matter of right, it is a defect which may be waived, where it does not appear that any prejudice may result by not insisting on the act being done as a prerequisite to making such a decree as would be just, on the merits of the case.

In *Campbell agt. Tousey* (7 *Cow. R. 64*) it was held that a foreign administrator who had received property of the decedent and had not taken out letters in this state might be sued in this state as executor *de son tort*, but it would be a defence that he had accounted in the due course of administration for all the property he had received.

In *Robinson agt. Crandall* (9 *Wend. Rep. 425*) foreign administrators were allowed to sue in their own names on notes belonging to their intestate, payable to bearer. They were treated as the real owners of the notes. There was no defence in that case, except that the plaintiffs alleged incapacity to maintain the suit.

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If, therefore, it appeared that the complaint was dismissed solely on account of the plaintiff being a foreign administratrix, I should hesitate to affirm the decision. There is, however, a defect which I deem fatal, conceding that the objection that the plaintiff is a foreign administratrix is one merely to her legal capacity to sue, or to further prosecute this action, and is waived by omitting to demur to the supplemental complaint.

The defendants are members of a joint stock company consisting of more than seven associates. The associates cannot be sued as such, until after a suit has been brought against the association in the manner prescribed by 3d R. S. (5th ed. p. 777, §§122, 125), and judgment has been obtained against it, and an execution against it has been returned unsatisfied. It was, therefore, right to order the supplemental complaint to be dismissed.

The case states that the complaint was dismissed at the trial. This clearly means the supplemental complaint. There was no other complaint before the judge who tried the cause. The case now before the court purports to contain the pleadings and to state the proceedings which were before the judge at the trial, and they contain no pleading except the supplemental complaint and the answer thereto.

The defendants' motion for a new trial should be denied and an order be entered dismissing the supplemental complaint absolutely with costs of the proceedings had thereon. I see no objection to the entry of a judgment to that effect.

There has been a trial between the parties now litigating before the court, within the meaning of the word trial, as defined by the Code. (Code, § 252).

The Code defines a judgment to be, "The final determination of the rights of the parties in the action."

The only parties in the action now litigating in it, are the plaintiff as a foreign administratrix and the defendants. A final determination that she has no right to further prose-

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cute it, and that her supplemental complaint be dismissed, is a judgment as that word is defined by the Code.

Such a decision and judgment if pronounced solely on the ground of the plaintiff's incapacity to prosecute the action will eliminate from the cause all proceedings commencing with her supplemental complaint, and leave it as it was when she intervened. If pronounced on the grounds that her legal incapacity is waived by an omission to demur, and that no action will lie against the defendants, and if both grounds are well taken, might be a bar to further proceedings, even if the plaintiff should take out administration in this state.

The judgment or final order may, and I think should, show the point decided, and the ground of the decision.

It will be time enough to determine the effect of the decision, when it is regularly raised hereafter for judicial adjudication.

ROBERTSON, J. It appears by the case that only one action was tried, one set of pleadings before the court, and one complaint dismissed, and that was the supplemental action brought by Mrs. Robbins to enable her to succeed to whatever rights her husband had in the original action, and prosecute it to a conclusion. One of the grounds on which such dismissal was asked for, was the legal disability of Mrs. Robbins to prosecute any action. Whatever testimony was admitted on such trial to sustain the original cause of action was, therefore, immaterial, and may be dismissed from our consideration. The present plaintiff's attorney appears from the complaint to have proceeded upon the erroneous view that the leave granted to file a supplemental complaint necessarily either absorbed the original action in the new one, or established the plaintiff's right to sue for the same cause of action. The present complaint, except that it alludes to the previous action, would be suitable for an entirely new one. As a supplemental complaint

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where the original alleges the facts on which the action is based, the reiteration of those facts is entirely unnecessary. What was in the original complaint (if any was filed) does not appear, as it is not before us. At all events it is necessary to try both actions before it can be determined whether there was originally a cause of action.

Clearly the determination whether the party filing the supplemental bill was entitled to succeed to the rights of the original plaintiff was necessary, before ascertaining whether there was any cause of action, and if she were not so entitled, the court would not undertake to pass upon the original issues in this cause, when the true successor to the plaintiff's rights was not before them to maintain them.

Assuming then that the only action tried was the supplemental one, and the only issue in it to be the right of Mrs. Robbins to succeed to her husband's position as plaintiff, I fully concur with the chief justice in holding that the objection to her right to prosecute by reason of deriving title under a foreign administration was waived, as being the second cause of demurrer specified in the 144th section of the Code; under section 148 such objection goes wholly to the right to sue, and not that to receive or discharge the claim. (*Doolittle agt. Lewis*, 7 *J. Ch. R.* 49; *Robinson agt. Crandall*, 9 *Wend. R.* 425). They may be sued in this state in their representative capacity for moneys collected by them, including such a claim (*Campbell agt. Tousey*, 7 *Cov. R.* 74), and they may assign their claims so as to give the assignee a right to sue.

A voluntary payment by the defendants to the plaintiff would have discharged the latter as against all claimants. The defendants may, therefore, choose to waive the objection as to the right to recover by the plaintiff, and put their defence on the merits. A payment by them after the action was terminated, whether voluntary or involuntary, would bar the action of any other person.

The mere leave to file the supplemental complaint decides

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nothing as to the plaintiff's rights. The judgment that the plaintiff in it have leave to prosecute the original action and succeed to all the rights of the first plaintiff is a different matter. Where the court can see on the face of the supplemental complaint that the former action is fatally defective, it may refuse such judgment. (*Candler agt. Pettit, 1 Paige R. 168; Day agt. Potter, 9 Paige R. 645*).

I think that the provisions of the statute of 1853 (ch. 153) amending the statute of 1849, as to joint stock companies (3 R. S. 5th ed. §§ 125, 827, pp. 777, 778), is peremptory in requiring suits against partnerships consisting of more than seven members to be brought against the president or treasurer, in order to determine their liability, and the remedy against their joint property to be exhausted, before an action can be brought against the individual associates.

The answer to the supplemental complaint is that the defendants are members of such a joint stock association, and therefore no action can be maintained against any one but the officers named in the statute. This may be considered as an objection arising under the first or fourth of the causes of demurrer specified in section 144 of the Code. The court has no jurisdiction of the subject of the action so as to make the defendants responsible, until after the recovery of judgment and issuing of execution against the officers of the association; and even if the defendants are at all proper parties to the supplemental action, clearly the officers in question should be added, and in that respect there is a defect of parties.

The dismissal of the supplemental complaint was, therefore, proper, and should be affirmed with costs. On the character of the evidence on the merits, I do not undertake to pass.

BARBOUR, J. This action was brought by Charles A. Robbins, in his lifetime, to recover the value of certain

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watches and other articles contained in a trunk, alleged in the complaint to have been placed by him in the hands of the defendants, as common carriers, to be by them delivered to him at Iowa city, in the state of Iowa, together with damages for the improper detention of other goods delivered to the defendants at the same time, for like transportation.

After the commencement of the action Robbins, the plaintiff, died, intestate, whereupon the present nominal plaintiff applied to the court for and obtained leave to file and serve a supplemental complaint, and to continue the action in her name as administratrix; under which order such supplemental complaint was served, and an answer thereto was put in by the defendants, Henry Wells and John Butterfield.

The supplementary complaint commences thus: "The plaintiff complaining of the defendants Henry Wells and John Butterfield, who, with others unknown to the plaintiff, do business in the city of New York as expressmen or forwarders under the name of the American Express Company;" and, after averring the placing of the goods in the hands of the defendants for transport, and their failure to deliver a portion of them, amounting in value to \$680, and an unnecessary detention of the others, and alleging that the plaintiff had been appointed, *by a county judge in the state of Iowa*, administratrix of the effects, &c. of Charles A. Robbins, concludes with a prayer for a judgment against the defendants for the alleged amount of the loss and damages.

The answer contains a general denial, and also sets up the fact, among other things, that the goods were received from Robbins by the American Express Company, a joint stock association composed of more than seven shareholders or associates, two of whom were the defendants Wells and Butterfield, the only defendants named in the summons and complaint; that such association was organized under

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the laws of the state of New York, and had a president (the defendant Henry Wells) and a treasurer.

Upon the trial, the plaintiff, to establish the delivery of the goods to the defendants, exhibited in evidence a receipt in the following words :

AMERICAN EXPRESS COMPANY.

Wells, Butterfield & Co., Express Forwarders and Foreign and Domestic Agents.

Wells, Butterfield & Co., Proprietors, { Livingston, Fargo & Co.,
Between New York and Buffalo, { 62 Broadway, { Buffalo, west.
and New York and Dunkirk. } New York. }

NEW YORK, Sept. 18, 1854.

Platt & Brothers have delivered to us two boxes and one trunk marked as follows: Charles A. Robbins, Iowa City, Iows, which we undertake to forward to only peril of navigation and transportation excepted. And it is hereby expressly agreed that said American Express Company are not to be held liable for any loss or damage of any box, package or thing for over \$150, unless the just and true value thereof is herein stated; nor for any loss or damage by fire; nor upon any property or thing, unless properly packed and secured for transportation; nor upon fragile fabrics, unless so marked upon the package containing the same; nor upon any fabrics consisting of or contained in glass.

For the proprietors.

Contents unknown.

PRIDE.

It was admitted that Pride, the signer of the receipt, was an agent of the American Express Company, and had authority to sign it. Evidence was also given, tending to prove that the trunk mentioned in the receipt was not delivered to Robbins at Iowa City until about the 20th of April, 1855; that it was then in bad order and condition, and that, upon being opened, it was found that a portion of the goods, consisting of gold and silver watches, &c., amounting to \$880.67, originally placed in such trunk, had been abstracted or lost therefrom.

On the close of the evidence thus presented on the part of the plaintiff, the defendants moved to dismiss the complaint upon the following grounds :

1st. Because the action is brought in the name of a foreign administratrix, who can have no status in this court. 2d. Because the action is not brought against the American Express Company, but against its individual shareholders. 3d. Because there is no evidence that any of the missing goods were put into the trunk.

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That motion was granted, and thereupon the plaintiff excepted and appealed.

Upon a careful examination of the case, I have become satisfied that the evidence given upon the trial was insufficient to establish the loss of the goods while in possession of the defendants or in that of the express company.

There is no evidence whatever to show that the invoice or bill which was in the hands of the Iowa witnesses, at the time they examined the contents of the trunk, was the real invoice which was furnished to Robbins by his vendors, or even a correct copy ; and the evidence given to show that the missing articles were placed in the trunk, and not in the boxes, is at best exceedingly slight. It appears, too, that the trunk in question was in the hands of Robbins some hours, at least, before it was examined by the witnesses ; and there is no evidence whatever as to its real condition or that of its contents at the time it was delivered to him.

I am also of opinion that the case made by the complaint, modified and changed as it was by the admission made upon the trial that the American Express Company was composed of more than seven associates, and the exhibition in evidence of the receipt of their agent Pride, was insufficient to authorize a judgment against the defendants ; for the defendants here are only two of more than seven partners or associates, all of whom were engaged in the same transaction, and were jointly liable, and who, except for the acts of 1846 and 1851 (3 R. S. 6th ed. 777), must all have been impleaded as defendants. Those acts, however (§§ 122, 125, *id.*), for the purpose of aiding creditors in the prosecution of their claims against associations composed of more than seven persons, have authorized suits to be brought against them in the name of their president or treasurer, and by the service of a summons upon such officer has prohibited the institution of actions against such association individually in the first instance in any

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other way; and this action is brought, not against the association, nor its president or treasurer as such officer, but against the defendants Wells and Butterfield individually, or as two only of more than seven partners.

But, although the plaintiff was not entitled to judgment upon closing her proofs, and when the motion was made to dismiss the complaint, it by no means follows that the court had power so to dismiss it. If the plaintiff in the supplemental complaint has no such standing in the court as entitles her to prosecute the suit, the action, which is still in existence notwithstanding the death of the original plaintiff (*Code*, § 121), ought to be permitted to stand so as to leave the real representative of the deceased plaintiff at liberty, if he should be so advised, to apply for leave to prosecute it to judgment. It seems to me quite clear that the true representative cannot properly be deprived of this right by the intervention of an outsider. Indeed, unless the proper parties were properly before the court at the time the trial was had, the judge had no jurisdiction to direct a dismissal.

It is well settled, both in England and this country, that courts will not take notice of letters of administration granted abroad, and that a foreign administrator has no right as such to maintain an action. (*Campbell agt. Tousey*, 7 *Cow. R.* 64; *Robinson agt. Crandall*, 9 *Wend. R.* 425, and *cases there cited*).

Of course, the plaintiff in the supplemental complaint is not entitled, as an administratrix, appointed in Iowa, of the goods, &c. of the original plaintiff, to continue the action as the representative of the original plaintiff, and to prosecute the same to judgment.

I am of opinion, therefore, that the order dismissing the complaint should be set aside and vacated; leaving the defendants to take such action in the premises as they may be advised.

Leftwick agt. Clinton.

SUPREME COURT.

LEFTWICK and another agt. CLINTON and another.

Where the plaintiffs are *non-residents*, and there are two or more defendants, they cannot appear separately and each require a bond to *him* as security for *his* costs. The statute requires only one bond which should run to "the defendants," and is for the benefit of them all.

The penalty is to be *at least* two hundred and fifty dollars, and may be required in such *larger sum* as the court or judge may deem proper.

Whether where one defendant had appeared and procured a bond to be filed, another defendant who had not moved, could except to the surety or obtain a new bond in an enlarged penalty? *Quare?*

Otsego adjourned Special Term, October 19, 1863.

THE plaintiffs were non-residents. The defendants appeared separately and each obtained an order that plaintiffs file a bond to *him* as security for *his* costs in the penalty of \$250, or show cause, &c.

BENJ. ESTES, *for plaintiffs*, claimed that only one bond could be required, and that it should run to "the defendants" and not to one of them.

J. A. LYNES, *for defendants*, contended that as the statute requires the plaintiffs to secure "the defendant," each defendant could require a bond. He argued that if one should succeed at the circuit or special term and the other should be defeated, but finally succeed on appeal, the defendant who succeeded at the circuit or special term might, if his costs were sufficiently large, before his co-defendant became entitled to costs, obtain judgment for and collect the whole penalty, leaving his co-defendant reme-
diless, and mentioned other difficulties in case but one bond were required.

CAMPBELL, J. The language of the statute is, "such security shall be given in the form of a *bond* in the penalty of *at least two hundred and fifty dollars*, with one or more sufficient sureties to the defendant, conditioned to pay on

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demand all costs that may be awarded to the defendant in such suit." The statute provides for but a *single* bond; that bond should run to the defendants if there are more than one, and should be for the benefit of all. But while the statute limits the security to a single bond, it does not prevent the court or judge from requiring a bond in a larger penalty than two hundred and fifty dollars. It must be "at least" in that amount. It is not necessary to decide whether a defendant who had not moved could afterwards except to the security, nor whether if a bond were once given on the application of one defendant the statutory remedy would be exhausted; nor whether the other defendant on coming in could have a new bond in place of the old with an enlarged penalty. The only question before me is whether a bond to each defendant can be required. I think not. There are no reported cases on this branch of the statute, and there will be no costs of the motion.*

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COURT OF APPEALS.

ELIAS BRAMAN agt. GEORGE G. JOHNSON and others.

The supreme court had jurisdiction of *equitable actions* concerning property, where the amount in controversy was *less than one hundred dollars*, commenced *prior* to the act of 1862 repealing the statute depriving the chancellor of such jurisdiction.

Argued June, 1863; decided October, 1863.

This action was brought in the supreme court several years ago, to foreclose a mortgage on which less than one

* Note.—All difficulty as to different defendants moving for security at different times could probably be avoided by the court requiring the motion of the one first moving to stand over until he gave notice thereof to the other defendants, and allowing them to be heard with him. Perhaps where one defendant moves it would be safer for him in the first instance to serve his motion papers on his co-defendants in the same manner as on the plaintiff.—R.F.

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hundred dollars was due; and less than one hundred dollars was due on the mortgage at the time of the trial.

The defendants' counsel moved to dismiss the complaint on the ground that the supreme court had no jurisdiction of the action, there being less than one hundred dollars due on the mortgage, and there being no reason why the mortgage could not have been foreclosed by advertisement. The motion to dismiss the complaint was denied.

The point was made in the court of appeals, that the complaint should have been dismissed, with costs, on the ground that less than one hundred dollars was due on the mortgage.

The court affirmed the judgment, holding that the supreme court had jurisdiction of the action at the time it was brought, which was prior to the act of 1862 (*Laws of 1862*, p. 859, § 39), although less than one hundred dollars was due on the mortgage.

Mr. Justice Lorr delivered the opinion of the supreme court.

HENRY M. HYDE, *for plaintiff.*

JOHN H. REYNOLDS, *for defendants.*

This decision agrees with *Cobine agt. St. John* (12 *How. R.* 333), and overrules the prevailing opinion in *Marsh agt. Benson* (19 *How. R.* 415). See *Durham et al. agt. Willard et al.* (19 *id.* 425).

Charles agt. Lowenstein.

SUPREME COURT.

DANIEL T. CHARLES agt. ANNA LOWENSTEIN and HENRY M. LOWENSTEIN.

A *judgment* obtained against a married woman in an equitable action to enforce payment out of her separate estate, of a debt arising upon her *guaranty* of the covenant of a third person, in which she charged her "separate real and personal estate," can only be enforced in *equity* through a *receiver* in the accustomed manner. Such a contract of the wife is not valid at law.

An *execution* cannot be resorted to, except to enforce a judgment at law against a married woman; and in that case the execution can only reach property in which she has a *legal estate*, and which is of such a nature as to be liable to levy and sale under execution in the same manner as if she were *sole*.

Monroe Special Term, December, 1862.

MOTION to modify the judgment in this action.

NEWTON & RIPSOM, *for defendants.*

D. B. BEACH, *for plaintiff.*

JAMES C. SMITH, Justice. This is an equitable action, brought in September, 1861, to enforce payment out of the separate estate of the defendant Anna Lowenstein, a married woman, of a debt arising upon her *guaranty* to the plaintiff of the covenant of a third person. By the terms of the *guaranty*, which bears date 15th March 1861, and was executed by her husband as well as herself, Mrs. Lowenstein expressly charged her "separate real and personal estate;" and agreed that the plaintiff might have a *lien* thereon for the fulfillment of her undertaking. The cause was tried at a special term in September, 1862, and decided in favor of the plaintiff, and he thereupon entered a judgment conforming, in most respects, to the judgment approved by the court in *Yale agt. Dederer* (21 *Barb.* 292). The defendant now moves to modify the judgment so that it shall direct: 1, "that the separate property of the defendant Anna, or so much thereof as may be necessary, be

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sold by the sheriff of the county where the same is situate, on the execution to be issued on such judgment;" or, 2, "that so much as shall be necessary be sold by the receiver, and that the said Anna be directed to join with such receiver in a conveyance of so much sold, to the purchaser or purchasers on such sales; and that a reference be ordered to some discreet person to ascertain and report what property the said Anna has, real and personal, and what, in his opinion, ought to be first sold to pay said debt, interest and costs." The defendant also moved to suppress the injunction clause contained in said judgment, and for general relief.

In respect to the first branch of the relief asked for, the defendant insists that since the legislation of last session the only mode in which a judgment recovered against a married woman can be enforced against her separate property, is by an execution directed to the sheriff. (*Session Laws* 1862, p. 345, § 7; 849, § 12; 850, § 13). I do not concur in this construction of the statutes referred to. I am of the opinion that under their provisions an execution cannot be resorted to, except to enforce a judgment *at law*, against a married woman, and in that case the execution can only reach property in which she has a separate *legal* estate, and which property is of such a nature as that it would be liable to levy and sale under an execution *if she were sole*. If the judgment against her is of an *equitable* nature; if it is to be enforced against her separate *equitable* estate; or if her chooses in action or other rights and interests which are not the subject of levy under an execution *at law*, are sought to be reached, then the aid of a court of equity must be invoked, and the court will act as it is accustomed to do in such cases, through a receiver.

Previously to the act of 1848, "for the more effectual protection of the property of married women," the only separate estates which courts of equity recognized the right of married women to dispose of as if they were *femes*

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sole, were strictly equitable estates. The act of 1848 and the act of 1849 amendatory thereof, having created in the wife a separate *legal* estate, theretofore unknown, it was for a time doubted by many judges whether such estate could be laid hold of by courts of equity in giving relief to creditors against the separate estate.

In the case of *Colvin agt. Carrier* (22 *Barb.* 371), after an elaborate examination of the question, it was decided that when the wife has charged her separate estate, a court of equity may enforce the charge against the legal estate created by the statute, as well as against a strictly equitable estate. One of the grounds upon which the decision was put was, that unless such separate legal estate could be reached in *equity*, it would be out of the pale of the law, as the statutes which created it did not allow the wife to make contracts, nor to be sued in courts of law. (*Per E. D. SMITH, J.*, pp. 383, 384.)

Now, however, under the statutes of 1860 and 1862, many contracts of a married woman are valid *in law* (*Sess. Laws* 1860, ch. 90, p. 157, § 2; *Barton agt. Beer*, 35 *Barb.* 78; *Sess. Laws* 1862, ch. 172, pp. 343, 344, § 1); and she may be sued in *any* of the courts of the state. (*Id.* § 7.)

To render these provisions effectual, some mode of enforcing a judgment at law against the separate legal estate of a married woman, "in the same manner as if she were sole," is obviously indispensable; and for that purpose alone, as I conceive, the legislature adopted the provisions respecting an execution, which are relied upon by the defendant.

The judgment is conclusive evidence upon this motion, that the contract of the wife, on which the action is brought, was not valid *in law*, and that the charge thereby created could only be enforced in equity. These views necessarily lead to a denial of the first branch of the motion. The judgment is nevertheless somewhat defective, and should be modified in the following particulars:

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First.—It should appoint a referee to take an account of the separate estate, both real and personal, of the defendant Anna, and of the income thereof, and the situation and possession thereof, and to report the same to the court.

Second.—Instead of directing that in case of deficiency after applying the personal estate to the payment of the plaintiff's claim, the *entire* real estate be transferred to the receiver for that purpose, it should be modified so as to direct that sufficient of the real estate to pay the residuum of the claim be transferred to the receiver.

Third.—It should direct that the receiver's sale of personal property be public, and on reasonable notice.

Ordered accordingly, without costs to either party.

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SUPREME COURT.

BROWN and others agt. THE NEW YORK CENTRAL RAILROAD COMPANY.

Where the *report of a referee* is so materially defective as not to pass upon *all the issues referred* to him, the court at *special term*, although it has the power to send back the report for this reason, will not exercise it, where an *exception* has been taken to the report on this ground. The general term can reverse the judgment and order a new trial on this exception.

Where the referee has stated the *facts separately* upon which he rests his legal conclusions, the objection that he should have found *other facts* should be reserved for the decision of the *appellate court* upon the case and exceptions.

New York Special Term, October, 1863.

MOTION to send back report of referee as being defective in not passing upon all the issues referred to him.

CLERKE, J. The court undoubtedly at special term has the power to send back the report of a referee when it is so materially defective as not to pass upon all the issues referred to him. But I think it very inexpedient to exercise this power when the party who asserts that the referee has not performed his duty in this respect has, with other exceptions, excepted to the report on this ground.

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At the hearing before the general term, if the court discover that the referee has omitted to report upon all the issues, and that the party injured by the omission has duly excepted, as in this case, the judgment will be reversed on this ground, and a new trial will be ordered. In *Snook agt. Fries* (19 Barb. 313) the referee omitted to state the facts found and the conclusions of law separately, as required by section 272 of the Code, which omission the court thought should have been supplied before bringing the case to argument. But, where the referee has stated the facts separately upon which he rests his legal conclusions, the objection that he should have found other facts, should be reserved for the decision of the appellate court upon the case and exceptions. I may as well add that I have no doubt that the referee can, of his own accord, state any additional proceeding which he may deem proper in the settlement of the case.

Motion denied without costs.

SUPREME COURT.

GEORGE W. JONES agt. WILLIAM H. SEWARD.

The *constitution of the United States* has never invested the *President* of the United States, either in his civil capacity, or as commander-in-chief of the army and navy, with power to *arrest or imprison*, or to *authorize another* to arrest or imprison any person *not subject to military law*, at any time or under any exigency, *without some order, writ or precept or process of some civil court of competent jurisdiction*.

And where an action for damages is instituted in a *state court*, which brings in question this power to arrest and imprison a citizen of such state, the *state court* has *full power and jurisdiction* over the subject.

New York Special Term, October, 1863.

THIS was a motion to transfer the action to the United States circuit court, under the act of congress of March 3, 1863, entitled "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases." The plaintiff,

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who is an ex-senator, on his return from Bogota, where he occupied the position of United States minister under President Buchanan, on coming to New York from Washington, where he had been to submit his accounts, was arrested and incarcerated in Fort Lafayette, by order and direction of the defendant.

JAS. T. BRADY and W. C. TRAPHAGEN, *for the motion.*
JOHN McKEON and Mr. MEAD, *in opposition.*

CLERKE, Justice. This is an action in which the plaintiff claims damages for an alleged false imprisonment. The defendant asks for an order of this court to remove the action, and all proceedings therein, to the next circuit court of the United States, to be held in and for the southern district of the state of New York. The defendant states in his petition for this order, that the action is brought for acts alleged to have been done by him as secretary of state for the United States of America, under authority derived by him from the President of said United States, in causing and procuring the plaintiff to be arrested and imprisoned, or for some other wrong alleged to have been done to the plaintiff under such authority, during the present rebellion of the so-called Confederate States against the government of the United States of America, and that it therefore comes within the act of congress passed March 3, 1863, entitled "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases," providing in the fifth section that if any suit has been or shall be commenced against any officer, civil or military, or any other person, for any arrest, imprisonment, trespass or wrong done, or any act omitted to be done, during the present rebellion, "by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of congress," the defendant may remove such action into the circuit court

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of the United States for the district where the suit is brought, on complying with certain requirements stated in the act.

Of course, this act, so far as it directs the transfer of cases from the state to the federal jurisdiction, if it has any constitutional foundation, is founded upon the third article of the constitution of the United States, defining the extent of the judicial power delegated by the states to the federal government, and particularly upon that part of section 1 of said article which says that "the judicial power shall extend to all cases in law and equity arising under this constitution," &c. The defendant in this application maintains that the defence which he intends to set up in this action arises under the constitution of the United States; the question to be determined being, whether the President of the United States, during a rebellion or insurrection, can arrest or imprison, or authorize another to arrest or imprison, any person not subject to military law, without any order, writ, precept or process of some court of competent jurisdiction. Now, we assume that this question, if a question at all, would arise under the constitution of the United States; that is, whether the President possesses this power, either in his civil capacity, or as commander-in-chief of the army and navy of the United States, and can be solved only by consulting and interpreting that instrument. But, to entitle the defendant to this order, and to give the courts of the United States jurisdiction of this action, there must be some appearance or color of substance in it. It must have some speciousness, some seeming of plausibility, and must not be palpably devoid of any ground of doubt. Can it then be a question, presenting any appearance of substance or color of doubt, whether the constitution of the United States of America has invested its chief executive officer with power to arrest or imprison, or to authorize another to arrest or imprison, any person not subject to military law, at any time, or under any exi-

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gency, without some order, writ or precept or process of some civil court of competent jurisdiction ?

I. It cannot, of course, be pretended by the most ardent advocate of this high presidential prerogative, that the constitution confers it in set terms. There is, assuredly, nothing in that instrument which can be tortured into the conferring of such a power on the President in his civil capacity ; and this, it appears to me, plainly disposes of the question ; for it would be asserting the grossest contradiction and strangest anomaly to say, that absolute and unlimited power, equal to any exercised by Czar or Sultan, can be implied from a constitution which avowedly gives no power to any department of the government that is not specifically set forth, except simply the consequent right to employ all legal means necessary to the execution of the power.

It may not, however, be out of place, at a time like the present, to glance at the position which some ardent advocates of presidential unlimited prerogative, in seasons of war, rebellion or insurrection, have endeavored to uphold. It is demanded for the President, by these advocates, from the nature and necessities of his office, in times of imminent peril to the very existence of the nation. They have ventured to say, that the authors of this constitution could never have intended to deny to him in such times all power which may be deemed indispensable for the preservation of the nation, when it is convulsed by civil commotion and threatened with the hostility of foreign powers. But, if there is anything beyond all controversy in the constitutional history of this nation, it is that the purpose of this constitution and the provisions which it contains were, for a considerable period before its adoption, anxiously and deliberately considered and thoroughly discussed by the people at large and by their delegates in the convention ; and, certainly, any man proposing to confer unlimited power on any department of the government, on any pre-

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text whatever, would not have been deemed sane. With far-seeing caution and the most vigorous and deliberate purpose, a constitution for a national government was framed, conferring extremely limited powers, concisely and minutely specified, at the same time providing ample means for self-preservation, and the vigorous exercise of necessary authority under all emergencies. Its authors and the people of the several states had plainly set before them, while it was under consideration, the example and experience of that nation from which their language, their laws, their social customs and political institutions were mainly derived; and they well knew that the contest which convulsed that nation for four centuries with great alternations of triumph and defeat, vital and pre-eminent, immeasurably above all others, related to the power of the crown over the personal liberty of the subject.

No doubt, before constitutional liberty was established in England, the monarch claimed, and often exercised, the power of arbitrary arrest and imprisonment; and, during the reigns of the Tudors and the Stuarts, it was held by some judges that, "although the King could make no laws but by common consent in parliament, yet, in time of war, by reason of the necessity of it to guard against dangers that often arise, he useth absolute power, so that his word is law." Indeed, it was asserted, even in parliament, on behalf of Elizabeth, that the "Queen inherited both an enlarging and a restraining power; by her prerogative, she might set at liberty what was restrained by statute, or otherwise, and by her prerogative she might restrain what was otherwise at liberty; that the royal prerogative was not to be canvassed, nor disputed, nor examined, and did not even admit of limitation; and that absolute princes, such as the sovereigns of England, were a species of divinity."

It is shown from indisputable authority that, at least during the Tudor dynasty, "whenever there was any insurrection or public disorder, the crown employed martial

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law; and it was during that time exercised, not only over the soldiers, but over the whole people. Any one might be punished as a rebel or an aider and abettor of rebellion, whom the provost-marshall or lieutenant of a county, or their deputies, pleased to suspect." This power was employed by Queen Mary in defence of the old theology, and by Queen Elizabeth in defence of the new; and after the suppression of the northern rebellion, which agitated the kingdom during a portion of the reign of the latter princess, she severely rebuked the Earl of Essex because she had not heard of his having executed any criminals by martial law.

In 1552, when there was no rebellion or insurrection, King Edward granted a commission of martial law, and empowered the commissioners to execute it in such a manner as should be thought by their discretion most necessary. Hume mentions numerous other instances of the exercise of this despotic power during the reign of Elizabeth. But the more general diffusion of knowledge and the progress of civilization, produced by the revival of learning, the invention of printing, and the discovery of the western hemisphere, aroused the people to a sense of their debased condition, and the vindication of their ancient rights; and her successor, James I, found his claims of divine right and unlimited prerogative frequently disputed. It was not, however, until the reign of his perfidious and unfortunate son, that any organized resistance was made to these claims.

But, above every other invidious claim of prerogative, the power of arbitrary imprisonment was the most abhorrent to the nation. In the debates in and out of parliament, while the committee were engaged in framing the petition of right, the inviolability of personal liberty was deemed paramount even to the right to life and property. "To bereave of his life a man not condemned by any legal trial," it was contended, "is so egregious an exercise of

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tyranny that it must at once shock the natural humanity of princes, and convey an alarm through the whole commonwealth. To confiscate a man's fortune, besides being a most atrocious act of violence, exposes the monarch so much to the imputation of avarice and rapacity, that it will seldom be attempted by any civilized government. But confinement, though a less striking, is no less a severe punishment; nor is there any spirit so erect and independent as not to be broken by the long continuance of the silent and inglorious sufferings of a prison." The power of imprisonment, therefore, it was maintained, being the most natural and potent engine of arbitrary power, it was absolutely necessary to remove it from a government which is free and legal.

These principles, on which the act known by the name of the petition of right, and which has been called the second great charter of the liberties of England, were ratified by the King. He thus solemnly bound himself, among other things, never again to imprison any person except in due course of law, and never again to subject civilians to the jurisdiction of courts-martial. How shamefully he violated this solemn covenant, and how ignominiously he forfeited his life and his crown, as the righteous punishment of his perjury, is one of the saddest and gravest and most instructive records of history. His sons and successors, Charles II and James II, particularly the latter, indifferent to or forgetful of the fate of their father, did not hesitate, when occasion seemed to require, to violate the rights of their subjects, until James, at length, intimidated by the indignation of all classes of his people, struck with terror, saved himself from the death which he deserved, by timely flight, and ended his wicked and disgraceful career as a pensioner of France. His abdication ended the long struggle forever in favor of the exemption of the basest and humblest criminal from arbitrary imprisonment under any pretence, and constitutional liberty

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was *established* in England. In order to place it on principles impossible to be misunderstood or evaded, the convention issued their declaration of right before the crown was offered to William and Mary. On these conditions it was thankfully accepted. The principles which the convention reiterated were, indeed, as Macaulay says, engraven on the hearts of Englishmen during four hundred years: "That without the consent of the representatives of the nation," he continues, "no legislative act could be passed, no tax imposed, no regular soldiery kept up; that no man could be imprisoned, even for a day, by the arbitrary will of the sovereign; that no subordinate could plead the royal command as a justification for violating any right of the humblest subject, were held, both by whigs and tories, to be fundamental laws of the realm." But despotic monarchs, under some plea of necessity, as we have seen, frequently disregarded those laws. The declaration of right, and the mutiny act passed soon after, put an end forever to any pretext, on behalf of the crown, to deprive a civilian of his personal liberty without some order, writ, precept, or process of some court of competent civil jurisdiction. It has never been pretended, since the declaration of right was proclaimed, and the first mutiny act was passed, that any but members of the army and navy were subject to martial law or the articles of war. It was conceded by all the counsel in *Grant agt. Gould* (2 H. B. 69), and reiterated by the court, that martial law could only be exercised in England so far as it is authorized by the mutiny act and the articles of war, which have cognizance only over the army and navy. Martial law, in the proper sense of the term, does not exist, and never has existed in England since the revolution. The mutiny act and the articles of war, like the military code, &c., adopted by congress, constitute what may more properly be called military law; and, though they provide for courts-martial for the trial of military offenders, they are

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totally different from that kind of martial law which prevails in despotic countries, and which legally exists under constitutional governments only within the immediate theatre of war or insurrection. Undoubtedly, on some occasions the writ of *habeas corpus* has been suspended, but never without the consent of parliament.

Now, is it possible that all the passages to which I have referred, in the constitutional history of England, and all the solemn and salutary warnings which they convey, were not engraven on the minds of the enlightened men who had the principal share in the formation and adoption of the present constitution of the United States of America ? Can it be supposed, for a moment, that any implied power, such as the defendant claims for the presidential office in the present instance, would have been tolerated by those men ? If they intended that a dictatorship should exist under any emergency, they would not leave it to the chief executive to assume it when he may, in his discretion, declare necessity required it, but would at least provide that this necessity should be declared by congress, and, as under the constitution of ancient Rome, that the legislative power alone should select the person who should exercise it. That the President can, of his own accord, assume dictatorial power, under any pretext, is an extravagant assumption. The proposition cannot be entertained by any court ; no such inquiry can arise under the constitution of the United States ; it does not reach to the proportions or stature of a question.

II. It is, however, maintained, if the President does not possess this power in his civil capacity, that he does possess it in his military capacity as commander-in-chief of the army and navy of the United States. A commander of an army has, of course, within the sphere of his military operations against an enemy, all power necessary to insure their success. General Rosecrans had a right, I have no doubt, the other day to destroy all property which caused

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any obstacles to his operations against Bragg ; and if he discovered any plots to mar those operations, or to give intelligence to the enemy, or to afford them any kind of aid or comfort, he would have a right to try the offenders, whether civilians or soldiers, by a court-martial. But his power does not extend beyond his lines. If a man at Cincinnati has a correspondence with Bragg, giving him intelligence of the plans of Rosecrans, the latter cannot have the offender arrested at Cincinnati, brought within his lines, and tried by a court-martial. This man is, indeed, emphatically a traitor ; he is guilty of high treason against the United States of America ; but he is to be tried by a civil tribunal, according to the course and practice of the established law, on a presentment or indictment of a grand jury. His case has not arisen in the land or naval forces, or in the militia when in actual service in time of war or public danger. (*See 5th amendment of the constitution.*) Although it indeed affects the operations of a certain portion of the land forces, it is not a military but a civil offence. Neither can even the commander-in-chief of the army extend martial law beyond the sphere of military operations. If he possessed this power, in time of war or insurrection, over the whole extent of the nation, whether within the theatre of military operations or not, the political institutions and laws of the land would be entirely at his mercy. A whisky insurrection in western Pennsylvania would authorize him to abrogate the law of liberty in Massachusetts or any other state. Martial law would extend, at the mere pleasure of the commander-in-chief, over the whole length and breadth of the land. It is beyond controversy, as we have seen, that this power does not vest in Mr. Lincoln as President ; but as a military commander he can possess no greater power than if he was not President, and was merely commander-in-chief of the army and navy. Suppose the constitution vested the command-in-chief of the army and navy in some person other

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than the President. Could this functionary subvert the constitution and laws of the land on the plea of military necessity? Surely not; and if he could not do it, neither can the President, unless the constitution has empowered him to do it in his civil capacity.

The opinion referred to by the counsel of the defendant, delivered by Chief Justice TANEY in *Luther* agt. *Borden* (7 *How.* 1), so far from sanctioning, makes no question of, this extension of the military power of the President. An actual insurrection existed in the state of Rhode Island, and military measures to suppress this insurrection were in operation there, by the intervention of the federal government on the application (I forget which) of the legislature or executive of that state. That commonwealth was in a condition of intestine war; and there, as in western Georgia and in Tennessee now, the officers engaged in the military service "might lawfully arrest any one, who, from the information before them, they had reasonable grounds to believe was engaged in the insurrection."

The formidable power, for which the defendant contends, is plainly not necessary to the safety of the nation, even if the constitution conferred it when that safety should be endangered. Within the immediate theatre of insurrection or war, the commander-in-chief and his subordinates, where the exigencies of the occasion make it necessary, we repeat, do possess it; beyond it the ordinary course of proceedings in courts of justice will be sufficient to punish any persons who furnish information or afford any aid or comfort to the enemy, or in any way are guilty of the detestable crime of betraying their country. In sudden emergencies, caused by invasion or insurrection, the power expressly given by the constitution and the acts of congress, to repel the one and suppress the other, are ample and effective; and it requires no exercise of arbitrary power over the sacred rights of personal liberty to accomplish this purpose. It is as manifest as the day—it is beyond

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all controversy—that these rights, in war or in peace, during invasion or domestic violence, even during the hideous rebellion which now confronts us, are, except in the cases which I have stated, inviolable. The President, therefore, whether in his civil capacity, or as commander-in-chief of the army and navy of the United States, has, unquestionably, no power to authorize the act of which the plaintiff complains. The ground upon which this application is made has no color of right. It cannot, in my opinion, be entertained as a question in any state or United States court. The only questions in this action worthy of consideration, and which can be entertained, do not arise under the constitution of the United States, but are fitly within the jurisdiction of this court.

The motion is denied, without costs.

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SUPREME COURT.

THE PEOPLE OF THE STATE OF NEW YORK and JAMES MURPHY and HUGH SMITH agt. THE NEW YORK AND HARLEM RAILROAD COMPANY and THE MAYOR, &c. OF THE CITY OF NEW YORK.

The *common council* of the city of New York have no authority, under the act of the legislature, passed April 6, 1832, entitled "An act to amend an act entitled an act to incorporate the New York and Harlem Railroad Company," passed April 25, 1831, to grant to or permit said railroad company the right to lay or construct a railroad track or tracks in Fourth avenue, Madison avenue, Union square, Broadway, Fulton street, John street, Whitehall street, in the city of New York, or any of them:

Because, 1st. Such a route would be an entirely *new and independent route*, as much so as if pursued under independent authority from the legislature; it being in effect a parallel route, which the legislature have in the 16th section of the act of 1831 reserved to themselves the right to grant to a distinct corporation.

2d. Nor is the proposed new route in any just sense a *mere extension* of the original railroad, as provided by said act of 1832.

New York Special Term, October, 1863.

People agt. New York and Harlem Railroad Company.

HEARING on order granted by Justice PECKHAM to show cause why an injunction should not issue against the defendants, the mayor, aldermen and commonalty of the city of New York, restraining them from granting to the New York and Harlem Railroad Company the right to lay or construct a railroad track or tracks in any of the streets or avenues in the city of New York, and from authorizing said company to lay a railway or track in Fourth avenue, Madison avenue, Union square, Broadway, Fulton street, John street, Whitehall street, or any of them, or to break and remove the pavement thereof, or in any manner obstruct said streets, preparatory to or for the purpose of laying or establishing such railroad track or railway therein, and also restraining the New York and Harlem Railroad Company from laying or constructing such railway or track in any of the streets or avenues aforesaid, and from breaking or removing the pavements therein, and from obstructing or incumbering any of such streets or avenues for such purpose, or disturbing or interfering with the carriage-way thereof, or interrupting the travel thereon, and granting a temporary injunction of the same purport against the New York and Harlem Railroad Company in the meantime.

LYMAN TREMAIN, A. R. LAWRENCE, GILBERT DEAN,
WALDO HUTCHINS, JOHN H. REYNOLDS, *for plaintiffs.*
JOHN K. HACKETT, CHARLES A. RAPALLO, HORACE F.
CLARK, AUGUSTUS SCHELL, JOHN K. PORTER, *for
defendants.*

HOGEBOOM, Justice. On the 21st day of April, 1863, the common council of New York passed an ordinance, which was subsequently approved by the mayor, granting permission to the New York and Harlem Railroad Company to extend their railroad and construct a double track from their present Fourth avenue track, between Seventeenth and Fifteenth streets, through Broadway to the foot of

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Whitehall street, with an additional single track around Bowling Green and State street, and another additional single track around Union square, with further permission to construct an additional single track to the Fulton ferry, through John street, Burling slip and South street, returning through Fulton street.

Permission was also thereby granted to said company to extend their railroad and construct a double track from their present track in Fourth avenue, through Twenty-third street to Madison avenue, and thence through Madison avenue as far as it is, or hereafter may be opened, with further permission to connect therewith by a single or double track from Fourth avenue to Madison avenue, through Twenty-fourth street.

It was provided in the ordinance that the company should pay to the comptroller of the city, monthly, for the benefit of the city, ten per cent. of the gross receipts from all the travel below Union square upon said authorized extensions. Also, that the company should, at their own expense, keep in repair the pavements between the curbs in the streets occupied or traversed by their extended railroad; should pay a license fee of twenty-five dollars for each car run upon the same, and should conform to some other provisions contained in said ordinance, not necessary to be here particularly enumerated, designed to insure the safety and convenience of the traveling public.

The New York and Harlem Railroad Company, pursuant to another provision in the said ordinance, notified their acceptance of the said ordinance within ten days after its passage.

By a preamble to the said ordinance, it is manifest that the common council relied, for their authority to grant the permission before recited, upon an act of the legislature of the state of New York, passed April 6, 1832, and entitled "An act to amend an act entitled an act to incorporate the New York and Harlem Railroad Company,"

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passed April 25th, 1831, which authorized and empowered the New York and Harlem Railroad Company to extend their railroad through such streets in the city of New York as the mayor, aldermen and commonalty of the city might from time to time permit.

And the main questions in this case arise upon the construction to be given to that act: whether the power thereby conferred has been exercised and exhausted; whether the laying down and construction of the railroad tracks, authorized by the ordinance, are a legitimate exercise of the right to extend their railroad, conferred by the amendatory act of 1832; and whether the latter act has been expressly or impliedly repealed by subsequent statutes abrogating the same or inconsistent therewith.

Some of these questions it will be necessary to consider.

The New York and Harlem Railroad Company was incorporated by an act of the legislature, passed April 25, 1831. They were empowered to construct a single or double railroad or way from any point on the north bounds of Twenty-third street to any point on the Harlem river, between the east bounds of the Third avenue and the west bounds of the Eighth avenue, with a branch to the Hudson river, between One Hundred and Twenty-fourth street and the north bounds of One Hundred and Twenty-ninth street. The practical location of the railroad within these prescribed limits would, I think, exhaust the power conferred, and prevent a subsequent change of location, except by consent of the legislature.

The line of the road, it will be observed, was only from New York to Harlem. The location of the tracks (if there were two) would have to be, I think, substantially upon the same route. The permission to build a double track would be construed to mean, I think, two tracks essentially upon the same location, for the purpose of enabling cars to run in opposite directions without detention or collision—and not two essentially different routes through

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different streets or avenues, such as would be occupied by parallel railroads. Indeed, the right of granting to other persons or corporations authority to construct parallel railroads, on streets or avenues not occupied by the New York and Harlem Railroad Company, was expressly reserved to the legislature by the 16th section of the same act.

Then came the amendatory act of the 6th of April, 1832, on which the defendants rely. By it, this company were "authorized and empowered, with the permission of the mayor, aldermen and commonalty of the city of New York, to extend their railroad along the Fourth avenue to Fourteenth street in the said city, and through such other streets in the said city as the mayor, aldermen and commonalty of said city might from time to time permit, subject to such prudential rules as were prescribed by this act, and as the said mayor, aldermen and commonalty, in common council convened, might prescribe."

By this act, the railroad, which before terminated at Twenty-third street, was permitted to be extended, that is, continued or prolonged, to Fourteenth street. This was ten streets further south upon the same avenue. But it was foreseen that public convenience and travel might require its further extension, and I think this was intended to be in the same general direction. It could not be extended further north, for it already extended in that direction to the Harlem river, and there were no streets beyond that river. The intent of the legislature was, I have no doubt, that it might be extended further south, if the interest of the community should require, and through such other streets, proper to accomplish that purpose, as the mayor, aldermen and commonalty might from time to time permit; not necessarily to terminate at the end of Fourth avenue, at the junction of Fourth or Fifth street, for it was foreseen that the public accommodation might require it to be carried further down; not necessarily to terminate at the end of the Bowery, for a large portion of the popu-

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lation and business of the city was still below that; not necessarily, perhaps, pursuing the route of either of these streets—at all events, not necessarily ending at their southern terminus, but through such other streets as the city authorities might permit or prescribe, consistently with the main purpose of the act. At the end of the Bowery, several streets diverged to the south, or in that general direction. The precise route was not intended to be defined, but this was, I think, designedly left to the sound discretion of the common council, having reference to the traveling and business interests of that crowded mart; and it was to be extended through such other streets as the mayor, aldermen and commonalty might from time to time permit. I see no reason to doubt that this was a continuous power, left to be exercised, from time to time, as the wants of the community should require. It was not therefore a power which was spent by a single grant or permission, but might be repeatedly exercised according to the exigency of the case.

Whether the power, once exercised and acted upon by the laying down of a track in accordance with the permission given, could be recalled, the track broken up, and a new route prescribed, is a question which is not necessary to be decided, and which I shall not discuss—it has its difficulties.

But I am strongly inclined to think that the extension authorized by this act was a longitudinal and not a lateral one. A lateral road is more properly a branch than an extension. It is spoken of under that name in the first section of the act of 1831, where authority is given to construct a branch to the Hudson river—that is, a road or route diverging from the main trunk of the railroad. So by the first section of the amendatory act of May 12, 1836, authority is given to alter and change the route or location of the branch of their railroad, which is to be constructed from the Fourth avenue to the Hudson river. So by the

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first section of the act of May 7, 1840, the right is granted to build a road through the county of Westchester, "extending thence northwardly to an intersection of the New York and Albany Railroad Company's line of road, and the right of extending a branch eastwardly to the state of Connecticut."

In saying that I think the extension authorized by the first section of the act of 1832 was intended to be longitudinal and not lateral, I do not mean that it should pursue the same precise direction with that portion of the road to which it was attached, not in any degree diverging from such a course, but that it should have the same general direction as a southern, southeastern or southwestern direction, and not a direction to opposite or widely divergent points of the compass.

For example, it is very possible that under the act of 1832, the New York and Harlem Railroad Company might, with the permission of the local authorities, if they had not located any other route, have diverged to the west at Fourteenth street, and passed down Broadway. There seems to be no absolute requisition that they should continue on the Fourth avenue below Fourteenth street; and there is no other street or avenue at that point on which they could pass, except Fourteenth street, and no street, after such divergence, by which they could so soon return to the same general course as they had before pursued as Broadway. But it is a different question, whether, after having practically located their road by a double track below Fourteenth street, through the Fourth avenue, the Bowery, Broome and Centre streets to the lower end of the park, used it in that location for a series of years, and maintained it in full operation to the present time, insisting still upon retaining that route, they can, in addition, locate and operate an entirely new and supplemental route through Sixteenth street to Union park, and thence through Broadway

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to the foot of Whitehall street. I think they cannot, and in part for these reasons :

1. Such a route would be an entirely new and independent route, as much so as if pursued under independent authority from the legislature to another corporation. It is, in effect, a parallel route, which the legislature have, in the 16th section of the act of 1831, reserved to themselves the right to grant to a distinct corporation. It would give to this company the right to operate a double track in two locations entirely distinct. This was not intended by the legislature. This power was not conferred by the act of 1831; and although the act of 1832 makes no mention of a limitation to a double track, it must be construed in connection with the charter of 1831, being an amendment thereof, and not enlarging the powers of the corporation in this particular.

The effect of the defendants' interpretation is to authorize this corporation, with the consent of the local authorities, to lay and construct railroads over every unoccupied street and avenue of the island of Manhattan. It is unreasonable to suppose that the legislature intended to invest this company, even under the superintendence of the common council, with powers and privileges so sweeping and comprehensive. The act must receive a reasonable interpretation, confining it substantially to the main purposes of its original enactment, except so far as additional powers are plainly conferred.

2. Nor is this new route, in any just sense, a mere extension of the original railroad. That road had an obvious limitation, by the terms of the charter, to a single route, though with a double track. It was designed to open a railroad communication between New York, at Twenty-third street, and Harlem. Below that point it was, probably, supposed that the public could be advantageously served by stages and other conveyances. By the act of 1832, permission was given, under certain limitations, to

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extend this route further south, doubtless with a view to public accommodation in the more southern portion of the city. In 1840, permission was given to extend it in the other, the northerly direction. In 1845, by the act of May 14th of that year, this power was conferred in more distinct and ample terms, to continue their road to a point on the Hudson river, opposite Albany. But it was probably never imagined, even by those interested in the corporation, that these acts vested the company with authority to establish parallel lines of railroad over the intervening territory between New York and Albany. Nor is it, in my opinion, a just construction of this act, to give it a wider scope in regard to its extension at the southern terminus, further than required by the plain terms or obvious meaning of the language employed. It may extend through such other streets as the common council may designate, but only through such other streets as may subserve the leading object of the extension, to wit, a continuation of the road to more southern portions of the island.

I think, further, that a reasonable interpretation of the act requires that the extension should be made from the terminus of the road already constructed, so as to be a legitimate continuation and prolongation thereof. It was to go further, not to return back. It was to be continued, not to branch off. It was to be a single route, not several routes. It was to be an extension, and not a branch.

I am not able to give this act any other construction. I therefore conclude that the permission attempted to be granted by the ordinance of the 21st April, 1863, was not warranted by the terms, intent or fair interpretation of the amended charter of 1832. This view is sufficient to dispose of the main question in the case, and makes it unnecessary for me to consider such of the other questions presented as relate to the supposed repeal of this act, by the passage of other acts inconsistent therewith.

There is an additional ground on which the defendants

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rest the justification of their proceedings in this case, and that is : that, independent of any statutory grant or authority, the permission granted by the common council to the New York and Harlem Railroad Company is maintainable as a lawful exercise of power granted to the common council under the ancient Dongan and Montgomery charters. But to this view of the case I think there are several answers :

1. The permission granted to the railroad company was, by the terms thereof, confessedly based upon the authority conferred by the amended charter of 1832. It professed to be derived from that source, and no other. Under that all the parties acted, and there is some reason for saying that to that the parties should be limited.

2. But whether so or not, it is no longer a debatable question, at least in this tribunal :

1. That the legislature have, notwithstanding these charters, the right to make grants of railroad privileges and franchises over the streets and avenues of the city, and that when this power is exercised it is superior to and exclusive of any power which previously resided in the local authorities ; and,

2. That the local government has no right to grant railroad privileges or establish railroads in cities, independent of legislative action and approval.

I must therefore overrule this ground of defence.

I think it is also settled, upon authority, that all public streets and highways are for the use of the people of the whole state, whether located in town or country ; that the interest in such use or the ownership thereof is *publici juris* ; that the appropriation of such streets to private or corporate use, without authority of law, under the consequent obstruction of them, and impediments to travel occasioned thereby, constitute a *nuisance* and justify an injunction, and that the people of the state are the appropriate parties to seek and enforce the necessary remedy.

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Hence, in this case the action is well brought in their behalf.

If so, it would not furnish a sufficient objection to the grant of an injunction, even if the other plaintiffs were improperly joined. I cannot say they are so; for although they might not have a good cause of action if the defendants were proceeding lawfully under valid grants, they may, nevertheless, sustain serious damages by the acts of the defendants, and, if such acts are unlawful, perhaps be entitled to the preventive remedy of injunction.

There are one or two other objections peculiar to one of the defendants, to wit, the corporation of New York, which it is necessary to consider:

1. It is said that this defendant cannot be prosecuted in a civil action otherwise than in the first judicial district.
2. That this defendant has no interest in the subject matter of the suit or injunction, and is not a necessary or proper party to the action.
3. That on the plaintiffs' own showing there is no cause of action, and no ground for an injunction against such defendant.

I will examine these questions briefly:

1. Section 1 of the act of 14th of April, 1860 (*chap. 379*), declares that "the supreme court in the first judicial district, the court of common pleas, and the superior court of the city of New York, shall have exclusive jurisdiction of all actions or special proceedings wherein the mayor, aldermen and commonalty thereof are made a party defendant."

This language is very comprehensive, but, I think, it never could have been intended to locate all actions in the city of New York, in which, whatever might be the cause of action, or wherever situated, or however numerous the parties might be, the corporation of the city was made one of the defendants. If such was the intention the law ought to be speedily repealed. It is susceptible of another interpretation, which is more agreeable to the probable intention

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of the legislature, and I think it should receive such interpretation. It may read that in actions in the first judicial district, the supreme court, the court of common pleas and the superior court shall be the sole tribunals to try causes in which the corporation is impleaded. Even this is a more liberal construction than was, I think, intended by the legislature.

I think the object of the legislature was to limit the jurisdiction to the specified tribunals in cases where the corporation was the sole defendant; or else, where the action was to recover a claim against the corporation. This is a reasonable inference from the phraseology of the second section, and I should give it that construction if it were necessary to decide that question in the present instance; which it is not necessary to do for reasons to be presently given.

2. Nor is it necessary to pass definitively upon the question whether a cause of action is stated in the complaint against the corporation, or whether it is a necessary or proper party to the suit. Notwithstanding the case referred to in the defendants' points, and decided in the first district, I am inclined to think the mayor, aldermen and commonalty of New York were proper parties to the action, inasmuch as the object of the action is not only to obtain the injunction, but to annul or declare void the ordinance, in maintaining which this defendant may claim and apparently has, an important pecuniary interest to the extent of ten per cent. of the gross receipts from travel below Union square, doubtless expected to reach a very large amount.

3. But, upon the facts stated in the complaint, I do not see any cause for an injunction against the corporation. There is no allegation whatever, that they are about to do or that they threaten any act whatever obstructing or incumbering the streets or otherwise, in execution of the permission granted, nor is it alleged, or does it appear, that the railroad company, in executing the ordinance, are the

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agents of the corporation, but it is rather to be inferred that they are independent contracting parties.

For these reasons, I am of opinion that the motion for an injunction against the mayor, aldermen and commonalty of the city of New York should be denied, and the temporary injunction dissolved, with ten dollars costs; but as against the other defendant, the New York and Harlem Railroad Company, that the motion for an injunction should be granted, and the temporary injunction continued; ten dollars costs of making and opposing the application to abide the event of the action.*

* NOTE.—It would seem that within the principles stated in this opinion, the Harlem Railroad Company have an undoubted right to extend their road from its present terminus in Park Row, into and through Broadway to the Battery, unless the power conferred by the act of 1832 has been exercised and exhausted. Because it is stated in the opinion "that a reasonable interpretation of the act requires that the extension should be made from the terminus of the road already constructed, so as to be a legitimate continuation and prolongation thereof. It was to go further, not return back. It was to be continued, not branch off. It was to be a single route, not several routes. It was to be an extension, and not a branch." It is true that this language was used in reference to the original terminus of the road in Fourteenth street; but it is entirely applicable to a still further extension of the road, unless, as before stated, the power to extend it has been exhausted. And this point appears to be conclusively settled by the learned judge where he says: "The precise route was not intended to be defined, but this was, I think, designedly left to the sound discretion of the common council, having reference to the traveling and business interests of that crowded mart, and it was to be extended through such other streets as the mayor, aldermen and commonalty might from time to time permit. I see no reason to doubt that this was a *continuous power*, left to be exercised from time to time as the wants of the community should require. It was not therefore a power which was *spent by a single grant of permission*, but might be *repeatedly exercised* according to the exigency of the case." This, unquestionably, is a fair and honest interpretation of the act. Consequently, whatever could have been legitimately done in extending the original road, under the permission of the common council, *can now be done under like permission*, as the power to permit is continuous in the common council.

Admitting, then, that the power to continue the road from Park Row through Broadway to the Battery is unquestioned, let us see what difference it would make, within the principles of this decision, whether the continuation commenced at Fourteenth street, instead of Park Row, and went through Broadway to the Battery, intersecting the present track at the junction of Park Row and Broadway? Such a route would undoubtedly be an extension of the Harlem railroad longitudinally in the same general direction further south, having its commencement at Fourteenth street and its terminus at the Battery. It is true there would be a parallel branch in the road; but would that be a violation of the act? If so, the present railroad,

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SUPREME COURT.

JOSEPH ALLEN agt. ADAM L. STARRING, JACOB G. WODRIG
and another.

A judge of the supreme court made an order in *supplementary proceedings*, that the judgment debtor appear and be examined before a referee. At the appointed time the parties appeared, but the referee was absent. The judgment creditor immediately obtained an order from *another judge*, appointing another referee and referee:

Held, 1. That the *first* proceedings were still in force, and the creditor could have applied to the judge who granted that order for the appointment of another referee, or of another time and place for the hearing before the same referee.^{*}
2. The judge who granted the *second* order, on motion made to him to vacate it, should have granted the motion.

Whether the *referee*, in the *first* proceedings, on application by the creditor, could have appointed another time for the hearing, and summoned the debtor before him? *Quere*?

as now constructed, has been a violation of the act ever since it was built; for it has a *lateral* branch running from Centre street *through Grand street to the Bowery*, and up Bowery to its junction with Broome street. Probably the common council, nor the Harlem Railroad Company, never dreamed that they were violating the statute when the railroad was built in this manner; and if the road as now built could not reasonably be considered a violation of the act, certainly a branch running in the *same general direction*, without altering the location of the commencement or terminus of the extended road, could hardly be considered such a violation.

Suppose, as is conceded, that it might have been; that the railroad had been built originally from Fourteenth street through Broadway to the Battery, instead of the route that it was built, it would have been an extension through *one street only*; and the act is very clear that it might be extended "*through such other streets* in the said city as the mayor, aldermen and commonality of said city might from time to time permit." Would the extension, then, through Broadway have prevented the extension of a branch through Fourth avenue and Bowery and other streets intersecting the Broadway road before it reached its southern terminus? Could the latter route be considered "*an entirely new and independent route*," which it is supposed the act of 1832 forbids? Is it not more in harmony with the broad and comprehensive language of the act to suppose that the different routes which were authorized "*through such other streets*," should be left entirely to the judgment and discretion of the common council, who, it must be presumed that the legislature understood, had the general guardianship of the city, and the welfare of its citizens in traveling through it by public conveyances, sufficiently to entrust it with such discretion?—*REP.*

* *NOTE*.—In *Reynolds agt. McEllhone* (20 How. 454), it was held that where the judge did not appear at his office at the time appointed, the order was not spent, but the defendant must wait a reasonable time for his appearance. The defendant, having on the same day paid over money in his possession, was held in contempt.

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Broome General Term, May, 1863.

Present, CAMPBELL, PARKER and MASON, Justices.

JUDGMENT was recovered by the plaintiff against all the defendants. It was paid by defendant Wodrig, and assigned to him by plaintiff. Wodrig issued execution against the other defendants, which was returned *nulla bona*. On the 3d of October, 1862, Judge PARKER made an order in supplementary proceedings, requiring defendant A. L. Starring to appear before Mr. Fassett, as referee, on the 26th of October, and appointing Fassett referee to take and report the evidence. The parties appeared, with their counsel, at the time and place mentioned in the order, but the referee was absent, and did not appear. Wodrig thereupon, the same day, procured an order from Judge Brooks, the county judge of Chemung county, requiring defendant A. L. Starring to appear before Mr. Robertson as referee, on the 21st of October. Defendant A. L. Starring made a motion before Judge Brooks, to set aside the order made by him, on the grounds: 1st. Wodrig, being a defendant, could not institute the proceedings. 2d. That the proceedings instituted before Judge PARKER were still pending and undetermined when Judge Brooks' order was made, and application for relief should have been made to Judge PARKER, upon an affidavit showing the facts. The motion was denied, and an appeal taken.

Mr. OSBORNE, for defendant Wodrig, respondent.

W. L. DAILEY, for deft. A. L. Starring, appellant.

The authority to entertain supplementary proceedings is vested in the judges as separate judicial officers, and not in the court; and when once commenced, the jurisdiction of the judge must remain until fully completed. (13 *How.* 382; 7 *id.* 59.) The proceedings are regarded as a substitute for a creditor's bill under the former system, and the rules settled in reference to proceedings under these bills

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may be regarded as controlling, when not altered by the Code. (2 *Abb.* 458; 2 *Duer*, 658.) In such cases discontinuance cannot be effected without an order. (10 *N. Y. R.* 500; 10 *How.* 85; 13 *Barb.* 183; 14 *How.* 95; *see also* 4 *Sandf.* 718; 11 *How.* 528; 15 *How.* 19; *id.* 412.) The defendant is as much entitled to costs in these proceedings, as a party in an equitable action. (7 *Paige*, 583.)

The proceedings instituted before Judge PARKER were not *abandoned*. The plaintiff did not refuse to attend. If he did not abandon them, they must still be pending; and if pending, the order of Judge Brooks was improperly granted. If they were abandoned by the plaintiff, he cannot commence them anew, at least not before excusing his default. (1 *Bosw.* 690.)

By the court, CAMPBELL, Justice. I think the order of the Chemung county judge should have been vacated. There was an order in full force, made by a justice of this court, for the examination of the judgment debtor. Both the debtor and the creditor had attended pursuant to the order of Justice PARKER, on the very day the order was made by the county judge. There was no abandonment or discontinuance of the proceedings. The referee was absent, it is true; but a new time for the examination could have been agreed on, or the justice, on application to him, would have appointed a further or, other time, or the referee, I think, could, on application to him, have fixed a time for the examination. The order for the examination of a judgment debtor is not a mere process to enforce the execution of the judgment, and is not founded on the judgment alone, but upon new facts in part. As a substitute for a creditor's bill, it is, in its nature, a new suit. (*Griften* agt. *Domniguez*, 2 *Duer*, 656.) It is instituted before the judge pursuant to authority given by statute, and the jurisdiction of the judge must continue until the examination is completed. (*Webber* agt. *Hobbie*, 13 *How.*

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382.) When the proceedings are complete, the judge may allow to the creditor, or to the party examined, witnesses' fees and disbursements, and a fixed sum in addition. The creditor should not be allowed to go round to different judges and obtain new orders, without, at all events, a formal discontinuance of the preceding ones, and giving to the debtor an opportunity to apply at least for costs. If such practice should be tolerated, it will be seen that great hardship might result. In my opinion, Justice PARKER had full and complete jurisdiction of the matter; that his order was in full force when the order of the county judge was granted; and the latter order should be vacated with costs of the motion.

Order of county judge reversed, with \$10 costs.



SUPREME COURT.

GEORGE W. CHADWICK agt. ABRAHAM D. SNEDIKER and others.

Where the plaintiff's attorney returned the answer of the defendant to his attorney, on the ground that the defendant told the plaintiff's attorney that he never swore to it, and entered judgment against the defendant as for want of an answer: Held, that the judgment be set aside for irregularity, with \$10 costs.

New York Special Term, October, 1863.

THIS was a motion made to vacate a judgment claimed by defendants' counsel to have been irregularly entered against the defendant Snediker, on the 4th day of September, 1863, for the sum of \$3,838.

T. J. CLUTE, *counsel for defendant Snediker.*

GEORGE F. HAVENS, *counsel for plaintiff.*

INGRAHAM, Justice. The defendants' attorney put in an answer in this case, which the plaintiff's attorney returned,

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alleging as the reason therefor that the defendant told him he never swore to it. He now swears that the defendant told him it was not his answer. I do not think that the plaintiff's attorney has any right to return an answer because the defendant tells him it was not his answer. He has no right to deal with the party in the management of the suit, if there is an attorney employed. The proper course was to move to strike out the answer on proof of these facts. This would give the attorney an opportunity to be heard in the matter. The judgment was irregularly entered as to this defendant, and must be set aside with \$10 costs, and with leave to the plaintiff to make such motion.

NEW YORK SUPERIOR COURT.

THOMAS BUTLER agt. GEORGE W. NILES, WILLIAM LEE and others.

An assignment of a judgment, upon a condition of being reassigned in case it cannot be set-off, does not transfer the ownership of it with sufficient absoluteness to enable the assignee to set it off by analogy.

And an assignment of a judgment, upon condition of a rescission of the transfer, in case the assignee cannot avoid a set-off, cannot be a transfer absolute enough to evade it.

In an action to set-off judgments by the plaintiff as assignee of the judgment, he cannot, even if entitled to set-off his judgment against that of the defendant, make use of it to defeat the incidental claims for costs growing out of any legal proceedings to collect the defendant's judgment, instituted before the assignment of the plaintiff's judgment to him.

New York Special Term, July, 1863.

THE plaintiff seeks to set-off two judgments obtained against the defendant Niles, of which he claims to be assignee, against a judgment obtained against him by that defendant, whereof the defendant Lee claims to be assignee. The former judgments were obtained in June and July, 1859, by Francis Morris, as plaintiff, and assigned in No-

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vember, 1862, to the plaintiff. The latter judgment was recovered in May, 1847, for \$141.84, and assigned to the defendant Lee in October, 1862.

D. M. PORTER, *for plaintiff.*

A. R. DYETT, *for defendants.*

ROBERTSON, Justice. It is entirely immaterial what either the plaintiff or the defendant gave for the judgments assigned to them, except so far as what was given tends to show a secret understanding to hold such judgments in trust for the assignors, or on condition of reassigning in case the same could not be set-off, or, what is substantially the same thing, to defeat any attempt at a set-off. (*Gilmour agt. Van Slyck*, 7 Cow. R. 649.) The question, also, whether the plaintiff had notice of the assignment to Lee was also immaterial for similar reasons to those which I have given in the case of *Pignolet agt. Geer*, argued at the present term of this court.

The questions in the cause are narrowed to one of fact, therefore: Whether there was any secret understanding between the defendants, Niles and Lee, that the latter should take an assignment of the former judgment, to allow the same to be collected for the benefit of the former, and prevent any set-off; in other words, in reality to hold it in trust for him;—and one of law, whether such an assignment prevents such set-off.

The assignment to Lee is dated in October, 1862, more than fifteen years after the judgment assigned was recovered. There was then due upon it the principal (\$141.84) and fifteen years and five months' interest (\$153.06), making together five dollars less than \$300.

At the time of such assignment, supplementary proceedings were pending on such judgment, conducted by the defendant Niles, and also an action to set aside certain conveyances by the present plaintiff. The defendant Lee was

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then between twenty-four and twenty-five years of age, a son of an old acquaintance and client of the former defendant, and known to him for several years previously. His name had been legally changed, with those of the rest of his family, from Solomon. He had two places of business; one in which he sold wooden and willow ware, and in the other segars. The defendant Niles had been previously offered \$450 for the judgment, and a short time before the assignment \$350. Lee had previously lent Niles \$25, then \$75; subsequently the latter offered to assign to him the judgment in question for \$200 in addition, stating that it was perfectly good, and that he would get his money in a short time. Lee supposed Niles to be then insolvent. No statement was made to Lee of the amount due on such judgment originally, except that it was assigned for \$300, on which representation he relied. He did not know the present plaintiff, and had not been in the habit of buying old claims. After the assignment, Niles continued to superintend the proceedings for collecting the judgment. He did not assign the right to any costs to the defendant Lee. Apparently he was not an attorney of the supreme court, or any other court in which such proceedings were had; but other attorneys conducted them, in whose costs or earnings he participated. There was no agreement made as to any action to be taken by Niles in collecting such judgments, nor did he promise to do so. The defendant Lee, after receiving the assignment, put it in his safe, but in a month or two afterwards returned it to the assignor. He employed, as his attorney in this case, a partner of the assignor. The latter spoke to Lee, before the trial, about retaining the counsel who appeared for them on the trial in this case, and it was understood between them that he should try the case for both. On the first day of the trial in this cause, the defendant Lee remained in an adjacent room, occupied by another court, until after the adjournment of this court. He testified

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that he did not come into the room where this court was held, because, at that time, he expected to be subpoenaed when he was wanted, and he told the defendant Niles, the same evening, that he had not been so, but when he came as a witness he did so voluntarily, without any subpoena. He also testified that he did not know that the trial was going on ; that he had to meet a person about four o'clock, and went into such court-room to listen to trials, as he often did, and that the defendant Niles found him in the court-room, where he was sitting after the adjournment of this court, and they walked up the street together. On the same evening Niles told Lee that he had seen the counsel, who had already been engaged in it for a day about trying the case ; Lee only on the morning of the second day of the trial asked such counsel if he would try the case, and the latter answered affirmatively. He never in person promised any fee to him. The defendant Niles testified on the first day of the trial that he spoke to such counsel, and he thought Lee did also, but he never told the latter to do so, and that he had never asked the latter to come to court.

The defendant Lee testified that he expected to lose the money advanced by him in case the judgment was not recovered. Both he and the defendant Niles testify that the assignment was not made as security.

Under these circumstances, is it fair to presume that the defendant Lee advanced his own and his father's old friend the sum of three hundred dollars ? For that he received an assignment of a judgment fifteen years old, on which supplementary proceedings and an action to set aside conveyances were pending. He knew nothing of the amount of the judgment or of the judgment debtor, and relied solely on the representation of the defendant Niles that it would be paid in a few days. The latter sold the judgment for \$300, after having refused \$350 a few days previous. Lee did not deal in claims, but in entirely different

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articles. He only retained the assignment a short time before he returned it to the defendant Niles ; and then of his own motion, and without any retainer from Lee, conducted a variety of proceedings to collect the judgment. Indeed, the latter seems to have had no interest in the amount of costs incurred or in any results, and the only attorney he employed was the partner of the assignor. He was at least so indifferent to results as to suspect a subpoena to attend a trial to which he was a party, and upon whose result the loss of the money advanced by him might depend. No pains were taken to inform him of the pendency of such trial. While it was going on he remained in an adjacent room listening to other trials, the only reasons given being that such was his habit, and he had to meet a person at four o'clock, although he had two places of business to attend to. After the court had adjourned he was easily discovered by the assignor of the judgment, by whom he was informed for the first time of the trial and of the necessity to retain the counsel who had been already trying the case for a day, and on the morning of the next day for the first time he asked such counsel to try the cause, although it had been already understood between him and the defendant Niles that the same counsel should act for both. He believed Niles to be insolvent ; his only hope, therefore, of getting his money back was by means of the judgment, unless there was some secret or honorable or legal obligation entered into to refund it.

The testimony of the defendants Lee and Niles thus establishes a willingness by the defendant Niles to sell, and his actual sale of a claim for less than he had been offered and expected to get, and a subsequent zealous prosecution by him of the proceedings for enforcing it, without a retainer for the purpose, or prospect of compensation from the defendant Lee. A purchase by a dealer in wooden and willow ware of a claim fifteen years old in judgment against a person of whom he knew nothing, to collect which

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several legal proceedings, intricate if not doubtful, were pending, without inquiry as to its original amount or any calculation of the amount due ; his indifference to the proceedings which the assignor was so vigorously conducting ; his failure to give any instructions for the prosecution of the claim ; the little pains to notify him of the trial ; his own convictions of his position being that of a witness to be compelled to attend, rather than a party who had interests to be looked after ; his opportune presence within call at the time of the trial, for a purpose not very satisfactorily explained, and the equally opportune discovery of such presence by the assignor of the judgment immediately after the adjournment of the court ; his postponement of the retainer of counsel until the time of the trial, and subsequently retaining him on the second day of it, after a suggestion to him by the assignor, although it had been previously arranged to employ such counsel for both parties. No fee was paid or promised on the occasion, and the previous retainer was as valid as any other act by the assignor as the agent of the assignee.

Such a purchase, such a sale, and such conduct of the parties would be incredible, if the assignee of the judgment were intended to be its permanent owner, and he had no other expectation or dependence for receiving his money back, except what could be recovered on it. He believed the defendant Niles to be insolvent ; took his word implicitly as to the value of the judgment ; never made, apparently, any complaint of his disappointment ; permits his assignor to carry on an expensive litigation at his risk without inquiry ; was not informed by his attorney, and never inquired about its progress, or attended to an important trial in it, and only retained counsel after that trial is half over. There can hardly be a doubt as to the least honorable obligation of the seller of the judgment, himself familiar with and conducting the legal proceedings in the case, and who expected profit from those already

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begun, as well as their continuance, when a tradesman, a friend, and the son of an older friend, acquainted perhaps with what he himself dealt in, but ignorant of judgments, their value, mode of collection or profitableness by subsequent costs, advanced money for his necessities, relying entirely on his representations, and took such judgment, although of less value, in payment, that he should return the money so advanced, whatever was collected on the judgment. Lee never could have doubted for one moment that he would do so. If so, the pregnant facts of this case would add to such an obligation the irresistible inference that by some means, not always capable of direct proof, some communication, not always capable of being discovered by questions of counsel, passed between the parties, making it an understood matter that if Niles could not collect the judgment he was to restore to Lee the money advanced, at some future day.

It would always be a serious obstacle to the collection of such judgments, if any of the judgments against Niles fell into the hands of the plaintiff so as to be set-off, and he knew was necessary to be obviated. Lee probably knew nothing of that, but if he understood he was to recover his money back, in case the judgment became in any way uncollectable, it was not necessary he should. As, therefore, an assignment of a judgment upon a condition of being reassigned in case it cannot be set-off, does not transfer the ownership of it with sufficient absoluteness to enable the assignee to set it off by analogy, an assignment of a judgment, upon condition of a rescission of the transfer in case the assignee cannot avoid a set-off, cannot be a transfer absolute enough to evade it. (*Gilmour agt. Van Slyck, 7 Cow. R. 649.*)

But even if the plaintiff be entitled to set-off the judgments assigned to him against the judgment of the defendant Niles against him, he cannot make use of them to defeat the incidental claims for costs growing out of the pro-

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ceedings instituted before the assignment to the plaintiff of such judgment, if properly commenced. They may have been legitimate and necessary consequences of the judgment when taken, and if the defendants Niles and Lee should be successful in such litigation, the plaintiff might have been bound to pay the costs. He has no right to take away the foundation of such proceedings, if still pending, by satisfying the judgment with those held by him. It is not equivalent to payment and acceptance in satisfaction *pendente lite*. The plaintiff must therefore either stipulate in this action to allow the defendants Niles and Lee to offset the costs in any proceeding or action pending to collect the judgment against him, to be adjusted against the plaintiff's claim, as well as the amount due on their judgment, and take judgment for the balance, if any—in which case there may be judgment given for the set-off asked for; or else his complaint must be dismissed without costs, with leave to set up the same matters in such former action and proceeding by way of supplemental answer, when affirmative relief can be given him, if he is thereto entitled.

A decision must be prepared for the court by the plaintiff, embodying facts and legal conclusions corresponding with the foregoing views, to be signed by me.

SUPREME COURT.

THE NEW YORK AND HARLEM RAILROAD COMPANY agt. THE FORTY-SECOND STREET AND GRAND STREET FERRY RAILROAD COMPANY and others.

The right or claims of the *city of New York*, or of a *railroad company* running through said city, to the use or privilege of the *streets* of the city, must be regarded as conclusively settled by the *court of appeals* in the case of *The People agt. Kerr* (25 How. Pr. R. 258).

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The interest which the New York and Harlem Railroad Company have in the *Fourth avenue* of the city of New York is a *right of way*; its franchise consists in its right to lay and use exclusively a railroad, subject to the duty of running public cars thereon. It has no control or interest whatever in that part of *Fourth avenue* *not occupied by its own road, except that common to the rest of the community*; that is, that it shall be kept free and clear for public use.

Consequently, the said railroad company cannot by action restrain another railroad company from laying a track for public use in *Fourth avenue*, each side of the plaintiff's railroad, so long as the action of the second railroad company is not *malicious*, although there may be difficulty of access to the plaintiff's cars by reason of the second railroad.

New York Special Term, October, 1863.

THE plaintiff, a railroad corporation, has a railroad running through certain streets in the city of New York, and in its course passing through *Fourth avenue* between *Twenty-third* and *Fourteenth* streets.

The defendants are the proprietors of a railroad running from *Fourth avenue* west on *Twenty-third* street, and from *Fourth avenue* east on *Fourteenth* street. The defendants propose and are about to connect their railroads on *Twenty-third* and *Fourteenth* streets, by laying connecting tracks on *Fourth avenue*, between *Fourteenth* and *Twenty-third* streets. Both branches of the defendants' road have a double track, and the plaintiff has also a double track, and the defendants propose to lay their track in *Fourth avenue* —one track on each side of the plaintiff's tracks. This would leave the plaintiff's double track in the centre of the street, and a single track of the defendants on either side. This would also leave twelve feet between the track of defendants and the curb on each side. This proceeding is complained of by the plaintiff as interfering with its use of its own property, in that it will obstruct the easy access to the plaintiff's cars from the sidewalks. The plaintiff also alleges that it cannot allow the defendants to use its (the plaintiff's) tracks, because its tracks are already fully occupied with the plaintiff's own business. The plaintiff also assumes certain exclusive rights to the use of *Fourth avenue* for a railroad, under its agreement with the city,

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and claims that no right to lay a track in the street can be granted, unless with the consent of the city, or payment to the city therefor.

The defendants had commenced laying their track when the plaintiff commenced this action to restrain their so doing, and obtained a preliminary injunction. This injunction the defendants now move to dissolve.

Moses Ely and H. W. Robinson, *for defendants.*
Horace F. Clark, *for plaintiff.*

PECKHAM, Justice. The objection as to the legal passage of the act under which the defendants claim, is sufficiently answered on the point as to which it was assailed. So far as any right or claims of the city, or of the plaintiff through the city, are concerned, we must regard them as conclusively settled by the court of appeals in the case of *The People agt. John Kerr and others* (25 How. Pr. R. 258).

So far as the proposed action of the defendants would be injurious to the plaintiff by competition, or otherwise than by directly taking the property of the plaintiff, we must regard the question as settled by the case of *The Charles River Bridge agt. Warren Bridge*, in the supreme court of the United States, and also by the claim of plaintiff's charter reserving to the state the right to alter or repeal its charter. (*Sherman agt. Smith*, 1 Black, 587.)

The case, then, must turn on the one question, whether the running by the defendants of a track on either side of the plaintiff's track is such an actual taking of the actual property of the plaintiff as cannot be done without compensation; for though there may be some question whether the crossing of plaintiff's track would not be such a taking as would require compensation, yet no such question is raised by the bill and answer or the papers on this motion. There is very little force, I think, in the objection that it is proposed to lay defendants' track so near to plaintiff's as to injure or practically interfere with its

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running. The track proposed is the same distance from plaintiff's track that plaintiff's tracks are from each other, viz., five feet. The interest which the plaintiff has in Fourth avenue is a right of way ; its franchise consists in its right to lay and use exclusively a railroad, subject to the duty of running public cars thereon. It has no control or interest whatever in that part of Fourth avenue not occupied by its own road, except that common to the rest of the community, *i. e.*, that it shall be kept free and clear for public use.

All and any persons have a right to pass along said street. They cannot stop and obstruct it. The crowd of passers may be so great as in itself to be an obstruction, yet, so long as it is a moving crowd, whether of individuals or vehicles of any description, it is a legal use of the street. Were the defendants, then, about to run any number of omnibuses, or other ordinary wheeled vehicles, the plaintiff could not complain. The injury to its road might be as great or even greater than that which may accrue from the proposed action of the defendants, and yet, so long as their action was not malicious, it cannot be pretended that the plaintiff would have a right to complain.

This shows that the consequence of which the plaintiff complains, *i. e.*, difficulty of access to its cars, may exist, and the plaintiff have no cause of action ; in other words, the fact may exist and be no wrong. Can it, then, be claimed that that which if caused by one means is not wrong, becomes a wrong on being effected by another means ?

The use of a city street by a railroad for running public cars has been decided to be a public use, the exclusive right to the track being controlled by the public right to the cars, that being, as the running of the defendants' cars would be, but an exercise by the public of the public right of way. The cars will not run unless in obedience to the public wants, for otherwise they would not pay. Should

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they do so for the mere sake of malicious annoyance to the plaintiff, other questions would arise. If, then, after the running of the plaintiff's road, the public retained a right to the use of the rest of the street, as a public street and for public use, and if this proposed use by the defendants be, as has been decided, a public use, the plaintiff has suffered no infringement of its rights or property ; and the injunction must be dissolved, with ten dollars costs.

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SUPREME COURT.

The corporation which, by virtue of a certain order made by Hon. GEORGE G. BARNARD, a justice of the supreme court, on the 6th day of December, 1862, is entitled "THE MADISON AVENUE BAPTIST CHURCH," but which was formerly called the Baptist Church in Oliver street, and WILLIAM PHELPS, WILLIAM H. CHAPMAN, RICHARD STOUT, WILLIAM D. MURPHY, WILLIAM J. TODD and ROBERT COLBY, trustees of and corporators in the religious society aforesaid agt. The alleged corporation, which, under a certain order made by one of the justices of the supreme court, on the 12th day of July, 1859, was called THE MADISON AVENUE BAPTIST CHURCH, and JEREMIAH MILBANK, GEORGE W. ABBE, MAURICE C. HULL, JOHN F. CUNNINGHAM and STEPHEN B. COLGATE, claiming to be trustees of and corporators in the religious society last aforesaid.

A controversy which is clearly one of *legal cognizance*, will never be the subject of *equitable jurisdiction*, unless facts are stated to show that a *perfect remedy at law* cannot be obtained.

Mere *assertions, threats and designs*, made against a grantee of real estate and the party in possession, cannot be deemed a *cloud upon the title*. (*Unless it be a thunder cloud.*)

If the owner of real property is injured by any false claims or representations in relation to it, he can probably maintain an action for damages against the wrong-doer, if he has incurred any; but the equitable jurisdiction of the court cannot be interposed; and before it will interfere in any way in relation to the disputed title, the party in possession must patiently await the commencement of legal proceedings against him.

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New York Special Term, November, 1863.

THE plaintiffs bring this action for the purpose of having their title to certain real estate settled, determined and confirmed by the judgment of this court.

LEWIS B. WOODRUFF and WILLIAM R. MARTIN, *counsel for the plaintiffs.*

JAMES T. BRADY and C. C. LANGDELL, *counsel for the defendants.*

CLERKE, Justice. The plaintiffs allege that they have purchased this property from the late owners of it; that they have given an ample consideration for it; that they have received the usual deed duly conveying it, and that they are in full possession of it. But they allege that the defendants make certain claims, threats and assertions, and indicate certain designs and intentions concerning this property, and that they declare that the order and deed, by which it was conveyed to the plaintiffs, were illegal and void, and that these assertions, threats and designs are calculated to interfere with and disturb the use of the same. In other words, this is an action to try, in anticipation, the title to real estate, by the intervention of the equitable powers of this court. When the defendants undertake the execution of these designs, and attempt to establish the invalidity of the conveyance to the plaintiffs, they have the constitutional right of doing so by an action for the recovery of the possession of this property, which, of course, is of legal, as contradistinguished from equitable, cognizance. A controversy which is clearly one of legal cognizance will never be the subject of equitable jurisdiction, unless facts are stated to show that a perfect remedy cannot be obtained at law. Now, the only allegation in this complaint, which has the least appearance of a case to entitle the plaintiffs to equitable relief, relates to the alleged threats and designs, calculated, as they say, to cast a cloud upon their title. But this is the first time I have ever heard

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that mere threats and designs against the grantee and the party in possession are to be deemed a cloud upon the title. There may be some pretext for the equitable intervention of the court in favor of the other party, if they sought it on the ground of the plaintiffs' fraud in obtaining the conveyance, for the adverse claim of the plaintiffs is valid upon the face of the instrument; and it would be necessary for the defendants to prove extrinsic facts in order to establish its invalidity or illegality. This is the only ground upon which the court will interfere to remove a cloud from a title. If the owner of real property is injured by any false claims or representations in relation to it, I presume he could maintain an action for damages against the wrong-doer, if he has incurred any; but the equitable jurisdiction of the court cannot be interposed; and, before it will interfere in any way in relation to the disputed title, the party in possession must patiently await the commencement of legal proceedings against him by his menacing adversary.

This complaint bears no resemblance to a bill *qua timet*, which was a bill of complaint filed by a party having merely a present right of future enjoyment, fearing that right would be damaged by the destruction or injury of the property in the meantime. The preventive relief which a court of equity affords in such a case would only be requisite in those cases where the property is of a perishable nature, and would not be requisite in respect to the title or right to the possession of real property. Where an injury is done to real property, affecting the rights of a person entitled in remainder or reversion, the court will grant its injunction against the tenant of the particular estate, to prevent waste. But, certainly, this is not the character in which the plaintiffs in this action present themselves, nor this the injury of which they complain.

There must be judgment for the defendants on the demurrer, with costs. The motion for an attachment is denied, without costs.

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COURT OF APPEALS.

GEORGE RINCHEY, respondent agt. BURDETT STRYKER,
appellant.

Where an attachment is issued to the sheriff, he has a right to seize any property the defendants have disposed of, in any manner, with intent to defraud their creditors.

And the plaintiff in the attachment suit is not to be deemed a *mere creditor at large, after his attachment has been served*, but a creditor having a specific *lien* upon the property attached; and the sheriff, as the bailee of the plaintiff, has a *like lien*; and on the trial in an action against the sheriff for wrongfully taking the property, he has a right to show, *before judgment in the attachment suit*, that the title of the purchaser from the debtors was fraudulent and void as against the attaching creditor.

Argued June Term, 1863; decided October, 1863.

THIS action was brought in the supreme court to recover the value of certain goods that the plaintiff alleged the defendant forcibly and wrongfully took from his possession and carried away, at the city of Brooklyn, in November, 1857. The defendant set up in his answer, for a justification, that he was the sheriff of Kings county; that one of his deputies seized the goods by virtue of certain attachments granted by a justice of the supreme court, in certain actions commenced in that court, by divers persons, against William Cartwright and Moses R. Hassard; that the attachments were issued upon affidavits showing that Cartwright and Hassard were colluding, assigning and disposing of their property with intent to defraud their creditors, or had assigned or disposed of the same with the like intent; and that the goods, when seized, were the property of Cartwright and Hassard.

The action was tried at the Kings circuit in April, 1858, when it appeared that the goods taken by the defendant, deputy sheriff, were worth \$2,929.64.

The defendant's counsel, in his opening to the jury, stated that the goods belonged to Cartwright and Hassard;

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that they came into the possession of the plaintiff from one Parise, under a fraudulent sale or assignment; that Parise derived his alleged title to the goods by an assignment made to him by Cartwright and Hassard, with intent to hinder, delay and defraud their creditors, on the 18th day of November, 1857; that the plaintiff had notice of the fraud committed by Cartwright and Hassard, at the time he obtained the goods; and that the attachments were issued as stated in the answer, under which the defendant, by one of his deputies, took the goods.

The defendant's counsel then offered in evidence exemplified copies of the affidavits and undertakings on which each of the attachments was issued; also the original attachments, and exemplified copies of the judgment rolls in the actions against Cartwright and Hassard, in which the attachments were issued; the judgments in those actions having been recovered after the commencement of this action, which was commenced on the 23d day of December, 1857. He further offered to prove the assignment from Cartwright and Hassard to Parise was made with the intent, on the part of the assignors, to hinder, delay and defraud their creditors, and taken by Parise with the like intent; and that the plaintiff's title was fraudulent as against the creditors of Cartwright and Hassard; and that the debts existed, for which the attachments were issued, as stated in the affidavits on which they were issued.

The plaintiff's counsel objected to the admission of the evidence, and to each and every part thereof, on the following grounds: 1. That the defendant could not justify under the attachments, because the attaching creditors were general creditors merely, and not judgment creditors, and therefore not in a position to attack the assignment and sale, or the title either of the assignee or the plaintiff. 2. That the judgments offered in evidence, having been recovered since the commencement of this action, were not admissible. The judge sustained the objection on each of

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the above grounds, and excluded the evidence so offered and every part thereof. To which decision and ruling the defendant's counsel excepted. By direction of the judge, the jury rendered a verdict in favor of the plaintiff for the value of the property and interest on such value.

The defendant's counsel moved for a new trial on the exceptions, at a general term of the supreme court in the second district; which motion was denied; and a judgment was there rendered against the defendant for the amount of the verdict, with costs. From which judgment he appealed to this court.

Wm. D. BOOTH, *for appellant, cited and commented upon the following authorities: Code, § 227; chap. 723, § 7, Laws of 1857; Laws of 1831, chap. 300; Thayer agt. Willet, 9 Abb. R. 325; Patterson agt. Perry, 10 id. 82; Skinner agt. Oettinger, 14 id. 190; Kelley agt. Brensing, 33 Barb. 123; Schussel agt. Willett, 22 How. Pr. R. 15; Belmont agt. Lane, id. 365; Thayer agt. Willett, 5 Bosw. 344; and also numerous other authorities.*

JOHN H. REYNOLDS, *for respondent, cited and commented upon the following authorities: Reubens agt. Joel, 3 Kern. 488; Van Heusen agt. Radcliff, 17 N. Y. R. 580; Andrews agt. Durant, 18 id. 496; Hastings agt. Belknap, 1 Denio, 190; Hall agt. Stryker, 29 Barb. 105; Bently agt. Goodwin, 15 Abb. 82.*

BALCOM, J. The main question in this case is, whether the defendant, as sheriff, could rightfully seize the goods in question and take them from the possession of the plaintiff, by virtue of attachments issued by a justice of the supreme court, in actions in that court against Cartwright and Hassard, on the ground that they, with the intent to hinder, delay and defraud their creditors, assigned the goods in question to Parise, who took them with the like

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intent, and transferred the same to the plaintiff with notice of the fraud?

Section 229 of the Code authorizes the issuing of an attachment in an action for the recovery of money, where the defendant has assigned, disposed of or secreted, or is about to assign, dispose of or secrete any of his property with intent to defraud his creditors.

The attachments were regularly issued in actions for the recovery of money. But they were wholly useless as processes, unless they authorized the sheriff to seize the goods in question as the property of the defendants named therein, and gave him such a specific lien on the goods seized as enabled him to show their transfers to Parise and the plaintiff were fraudulent as against the creditors of Cartwright and Hassard.

The numerous authorities cited by the plaintiff's counsel have failed to satisfy me that an attachment is a useless process when the debtor has fraudulently assigned or disposed of his property before it is executed. They establish that a creditor at large, without any process or lien, cannot seize or hold the property of his debtor on the ground that he has transferred it with the intent to defraud his creditors. But none of them, except *Hall agt. Stryker* (29 Barb. 105), which was followed by the supreme court in this case, and induced the decision in *Bentley agt. Goodwin* (15 Abb. 82), show that an attaching creditor cannot prove, when sued for the property attached, that the plaintiff's claim thereto is invalid and rests upon a fraudulent transfer of the property by the debtor.

The cases mentioned in *Hall agt. Stryker*, which hold that an officer cannot justify, when sued by a stranger, for property he had taken on execution, without proving the judgment on which the execution was issued, as well as the execution itself, only tend to show that the production of the attachment by virtue of which the property has been seized, without the affidavit on which it was granted, is

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insufficient as a foundation for the defence ; that the plaintiff's claim to the property rests upon a fraudulent transfer of the same to him by the defendant named in the attachment.

The remarks of the judges who delivered the opinions in *Frisby agt. Thayer* (25 *Wend.* 396), and *Hastings agt. Belknap* (1 *Denio*, 190), and the other kindred cases cited, that a landlord, who seizes off the demised premises by virtue of a distress warrant, cannot prove, when sued for the goods by one who has purchased them from the tenant, that such purchase was fraudulent as against the creditors of the tenant, were *obiter*, and unnecessary to the determination of the cases in which they were made. Besides, a distress warrant is not granted by a judicial officer, but is issued by the landlord in person ; and the right to seize goods of the tenant on such a warrant, after they are removed from the demised premises, did not exist at common law. But I am constrained to say, if there is not any substantial difference in principle between those cases and the one under consideration, I cannot assent to the dicta in them : For the statute referred to in those cases only prohibits the seizure of the goods of the tenant, carried off from the demised premises, " which shall have been sold, before such seizure made, *in good faith* and for a valuable consideration, to a person not privy to such fraudulent removal " (2 *R. S.* 2d ed. 413, § 17) ; and the right to distrain, without the right to prove that the distress was lawful, when sued for making it, is no right at all. I have much less hesitation in repudiating the dicta referred to, than I should if distress for rent had not been abolished by the legislature.

- This course will not tend to unsettle any rule of law now acted upon by the profession or people at large, and it will open the way for establishing a principle upon a just foundation, which must be constantly acted upon so long as attachments are issued against debtors who have disposed of their property with the intent to defraud their creditors.

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The remark of JOHNSON, Ch. J., in *Andrews* agt. *Durant* (18 *N. Y. R.* 496), to the effect that a creditor cannot attack a fraudulent assignment of his debtor until he has proceeded to judgment and execution; and similar ones by other judges, in *Reubens* agt. *Joel* (3 *Kern.* 488), should have been qualified, as DENIO, J., qualified his remarks in *Van Heusen* agt. *Radcliff* (17 *N. Y. R.* 580). He said: "When a conveyance is said to be void against creditors, the reference is to such parties when clothed with their judgments and executions, or such other titles as the law has provided for the collection of debts." Judge BRONSON used similar language in *Noble* agt. *Holmes* (5 *Hill*, 194). He said: "The sale could not be impeached by a creditor at large; it must be a creditor having a judgment and execution, or some other process which authorized the seizure of the goods." He also said, in *Van Etten* agt. *Hurst* (6 *Hill*, 311), before creditors can attack a sale by their debtor for fraud, "they must show a judgment as well as execution; or where they proceed by attachment, they must show that the justice had jurisdiction, and that the process was regularly issued."

Vice-chancellor SANDFORD held, in *Falconer* agt. *Freeman* (4 *Sand. Ch. R.* 565), that a creditor, who takes out a warrant of attachment under the act relative to absent and concealed debtors, thereby obtains a lien upon the property of the debtor proceeded against; and if the sheriff be prevented from levying the warrant on the debtor's property, by means of fraudulent claims or transfers set up in respect to the same, the court of chancery will aid the creditor in enforcing the lien, by injunction and otherwise, on the same principle that the court aids an execution creditor similarly obstructed.

The New York superior court held, in *Thayer* agt. *Willet, sheriff* (5 *Bosw.* 344; *S. C.* 9 *Abb.* 325), that a sheriff, acting under a warrant of attachment issued as a provisional remedy under the Code before judgment, who has

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seized property in the possession of a vendee claiming title under a bill of sale from the defendant in the attachment, may show, in defence of an action against him by such vendee to recover the property, that the alleged sale was fraudulent as against the attaching creditor. And the decision in that case is supported by two well-considered opinions. The following cases agree with that: *Skinner* agt. *Oettinger* (14 Abb. 109); *Patterson* agt. *Perry* (10 id. 82); *Belmont* agt. *Lane* (22 How. Pr. R. 365); *Kelly, sheriff* agt. *Breusing* (33 Barb. 123). The same rule has been held in several other states; but it is unnecessary to cite the cases. Several of them are referred to by the judges of the New York superior court in *Thayer* agt. *Willett* (*supra*).

The fact that an attachment is issued in a case like this, before the debt is conclusively established on which it is founded, and that it may be subsequently shown by the defendant in the attachment that there was no such debt, is not a sufficient reason for holding that the attaching creditor cannot show that the property attached is in fact the debtor's, when sued for it by a third person who claims it by a title which is fraudulent as against the attaching creditor. Such third person may prove that no such debt existed until it is established by a judgment in the attachment suit. He may therefore defeat the attaching creditor on either of two grounds: 1st. That there was no debt to justify the issuing of the attachment; 2d. That he had a good title to the property in dispute when it was attached. Of course, the creditor or officer must first prove the existence of the debt for which the attachment was issued, when such debt has not been established by a judgment against the debtor. When that is done, the judgment proves it.

It certainly is not an insuperable objection to permitting all of this to be done, simply because it authorizes the trial of two different issues in the same action. Indeed, two different issues must be tried in the action, if formed

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by the pleadings, though the creditor has previously recovered a judgment against his debtor, and is able by it to establish conclusively the existence of his debt

When the creditor has no such judgment, the party, claiming that the property did not belong to the debtor when it was seized, has two chances of success. But when the creditor has obtained such a judgment he has but one. In other words, the conclusiveness of the judgment in effect narrows the litigation down to a single issue.

It has been said, that although the creditor may be able to show, when sued for the property attached, that a debt was justly due him, for which the attachment was issued, and yet be defeated in his action for the recovery of the alleged debt. It may also be said that he might be beaten in the first action by failing to prove his alleged debt, and succeed in establishing it in the second.

But this reasoning is no answer to the fact that the Code authorizes an attachment whenever the debtor has disposed of any of his property with the intent to defraud his creditors. And it is right on principle, if not settled by authority, that creditors should be permitted to attach the property of their debtors before conclusively establishing their debts by judgments, and thus prevent the consummation of fraudulent transactions which would deprive them of any successful remedy. And if, by the application of this rule, fraudulent purchasers should occasionally be beaten by persons who subsequently fail to establish their alleged debts, in their actions against their debtors, the only result would be that some concoctors of frauds would be punished by wrong persons. That is all. A like result would follow where the creditor recovers a judgment against his debtor, and takes property on execution which the latter had fraudulently disposed of, if such judgment should subsequently be reversed and the creditor finally beaten by his alleged debtor, after having beaten the fraudulent

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purchaser of the property in the action brought by such purchaser for the property.

But this has never been deemed a sufficient reason for preventing creditors from seizing the property of their debtors in the hands of fraudulent purchasers until after the existence of their debts has been conclusively and finally established.

The fact that the judgments against Cartwright and Hassard were recovered after the issues in this action were joined, was no reason for their rejection. Their recovery was not a matter that the defendant was obliged to set up in his answer. They were but evidence, though conclusive, of the existence of the debts for which the attachments were issued; which evidence the defendant did not have at the time he interposed his answer, to support it. If they had not been recovered, all the difference there would have been is, the defendant would have been obliged to prove the existence of the debts against Cartwright and Hassard by other and different evidence, and the plaintiff could have given counter evidence on that question.

I will add, that the justice's judgment, mentioned in *Doty agt. Brown* (4 *Const.* 71), was removed into the Chenango common pleas by certiorari, where it was reversed; but, on a writ of error brought to the supreme court, the judgment of the common pleas was reversed, and that of the justice affirmed. The opinion was delivered by Justice NELSON, but it has never been published.

My conclusion is, that the attachments in this case authorized the defendant, as sheriff, to seize any property the defendants, named in them, had disposed of in any manner with intent to defraud their creditors. I hold that the persons who procured the attachments are not to be deemed mere creditors at large of Cartwright and Hassard after their attachments were served, but creditors having a specific lien upon the goods and chattels attached; and that the sheriff, as their bailee, had a like lien, and had the

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right to show that the plaintiff's title was fraudulent as against the attaching creditors.

It follows that the evidence offered by way of defence to the action was erroneously rejected, and that the judgment of the supreme court should be reversed, and a new trial granted, costs to abide the event.

DAVIES, J., read an opinion, in which he came to the same conclusion.

DENIO, Ch. J., MARVIN, DAVIES and WRIGHT, JJ., were of opinion the affidavits, on which the attachments were issued, conclusively established the debt for which they were issued for all purposes in this action. The other four judges were of the contrary opinion, so that point was not determined.

All the judges, except EMOTT (who did not vote), agreed that the defence offered to be proved by the defendant was improperly excluded.

Judgment reversed, and a new trial granted, costs to abide the event.

NEW YORK SUPERIOR COURT.

LUCIEN D. COMAN, respondent agt. WILLIAM H. STORM,
appellant.

A person charged in execution in a civil cause, and held in custody by virtue thereof, is entitled to apply for a discharge from his imprisonment under 2d Revised Statutes, 31, article 6, as well where he is on the limits as in close custody. (Bylandt agt. Comstock [25 How. Pr. R. 429], so far as it decides to the contrary, disapproved.)

Before BOSWORTH, Ch. J., and WHITE and MONELL, JJ.
Heard November 7; decided November 14, 1863.

APPEAL from an order. The facts are stated in the opinion of the court.

COOPER & HOWLAND, for appellant.

T. BURWELL, for respondent,

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By the court, *BOSWORTH*, Ch. Justice. This is an appeal by the defendant from an order denying his petition to be discharged from imprisonment under article six of 2d Revised States, 31, entitled "Of voluntary assignments by a debtor imprisoned in execution in civil causes." The petition was denied, because the defendant was on the limits pursuant to a bond given by him to entitle him to that privilege, and was not actually confined within the walls of the jail building.

The only question presented by the appeal is, whether the defendant is a person "*imprisoned*" within the meaning of that word as used in section 1 of the article above cited?

The supreme court of this state, in 1802, *Holmes* agt. *Lansing* (3 J. C. 73 and 75, 76), and in 1810, in *Peters and others* agt. *Henry* (6 J. R. 121, 124), held that, under the statutes regulating the jail limits or liberties, the jails are "to be considered as enlarged from the four walls of the ancient law, to the assigned limits; and so long as the prisoner is within those limits, so long he is to be considered, in judgment of law, as in prison." No different rule has been declared since then. Being placed and kept there by virtue of an execution, he is *imprisoned* by virtue of such execution.

The Revised Laws of 1813 were enacted with a knowledge of the decisions that the jail limits were, in judgment of law, but an extension of the walls of the prison, and that a debtor held in custody on execution was, in judgment of law, *imprisoned*, whether on the limits or in close custody.

Section four of the Laws of 1813 (vol. 1, 349) is in substance like the sixth article first above referred to. That section declares, that "if any person shall be *charged in execution*, * * * and shall have remained in gaol the space of three calendar months," * * * he may present a petition to be discharged.

Article six of 2 R. S. 31, § 1, declares that "every per-

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son * * who shall be *imprisoned* by virtue of one or more executions in civil causes, * * may at any time petition the court from which such process issued, * * for his discharge from imprisonment," &c. The substantial provisions of this article are like the provisions of section 4 of 1 R. L. 1813, p. 349. The revisors, in their notes, do not express any intention to change the law.

Article six (2 R. S. p. 33, § 16) declares that "when any person shall have remained charged in execution for the space of three months, after being entitled to make an application for his discharge," without having made any of the applications in that section specified, "any creditor" &c. may "require such prisoner" to apply. It is quite evident that the words, "charged in execution," are used in this section as synonymous with the word *imprisoned*, as used in the first section; and the person charged in execution is also described in section 16 as "such prisoner." The word "prisoner" does not appear in that section before or after the words "such prisoner," and these two words clearly indicate that a person charged in execution, whether in close custody or on the limits, is "imprisoned" within the meaning of this article.

Upon the construction that he is not *imprisoned*, unless in close custody, his creditors at whose suit he was charged in execution cannot proceed against him, as provided in sections 16 and 17 of that article.

The Revised Laws (vol. 1, p. 349, § 4) direct that "the court shall order the prisoner to be brought up upon a day to be assigned," and that the assignee to be appointed shall first pay "the fees due to the sheriff or gaoler in whose custody he was." The Revised Statutes (p. 32, § 6, and p. 33, § 15) contain like provisions.

I find nothing in either of these provisions indicating the view taken in *Bylandt agt. Comstock* (25 How. Pr. R. 431), that only a person in close custody can apply for a discharge.

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The prisoner is ordered to be brought before the court, that a summary hearing may be had, and that he may be examined on oath, if that be desired. (2 R. S. p. 32, § 6.) If in close custody, the order enables him to be present at the hearing; if on the limits, the order enables an opposing creditor to compel his attendance.

The jail fees are to be first paid by the assignee, because the sheriff is required to discharge the prisoner on being served with the order for his discharge, "without any detention on account of any fees." (Id. § 11.)

If the jail liberties are to be regarded as merely an extension of the walls of the prison, and if persons charged in execution are to be regarded as in prison whilst on the limits, then they are clearly "imprisoned" whilst so held in custody.

That a person charged in execution in a civil cause, whether in close custody or on the limits, whilst held in custody by virtue of such execution, was entitled to apply for his discharge, has not heretofore been considered questionable. The practice has been to entertain their applications.

Whether they have given a limit bond or not, cannot be a matter of any consequence in respect to the question before the court.

The going at large within the limits or the liberties of the jail, whether the prisoner has or has not given a bond, is not an escape, if he be a person who would be entitled to the jail liberties on executing the prescribed bond. (3 R. S. 5th ed. 734, § 68.) He is, nevertheless, in judgment of law, *imprisoned* by virtue of the execution on which he was arrested and committed.

The decision in *Bylandt agt. Comstock (supra)*, although strongly intimating an opinion that a person charged in execution, if admitted to the jail liberties, cannot apply, does not rest mainly on that ground, but rather on the ground of a loss of jurisdiction.

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In proceedings under article 5, title 1 of chapter 5, part 2 of the Revised Statutes, the insolvent, if a discharge be granted to him, is to be discharged from imprisonment, whether in close custody or on the limits. The words of section 11 of that article are, that "if such insolvent be in *prison*, * * * he shall be discharged therefrom on producing his discharge granted pursuant to the provisions of this article, and upon indorsing his appearance upon any mesne process upon which he may be imprisoned." Here the words are, "in *prison*." A person on the limits obtained a discharge under that article, and went without the limits. The discharge was held a bar to a suit on the limit bond. (*Hayden and others* agt. *Palmer and others*, 24 Wend. 364.) The remarks of the court, that "although the 11th section of the act (2 R. S. 788) directs that if the insolvent be in *prison*, he shall be discharged therefrom *on producing his discharge*, it obviously was intended to apply to the case of close custody, and not where the prisoner is at large upon the limits," must not be understood as holding that only such prisoners as are in close custody can be discharged from imprisonment under that article. The contrary is decided by the case itself. The proposition stated is, that the *producing of the discharge* to the sheriff is only applicable to the case of a prisoner in close custody; and the head note is to that effect. If a person is in *prison* while on the limits, then it is quite clear that he is *imprisoned*.

The act to abolish imprisonment for debt, passed April 26, 1831, in its 20th section provides that "every person imprisoned on civil process, at the time of this act taking effect as a law, in any case where, by the preceding provisions of this act, such person could not be arrested or imprisoned, shall be entitled to be discharged at the expiration of three months after this act shall take effect as a law," unless the creditor, at whose suit such person shall be imprisoned, make the application in that section spe-

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cified, and prosecute it to the result there stated. Section 21 authorizes "every person imprisoned," as in section 20 specified, to give a notice to the creditors at whose suit he "is imprisoned," and present a petition and inventory as specified in sections 12 and 13 of that act. By section 13 the account of creditors and inventory of the estate are to be like those required by article 6 of title 1 of chapter 5 of part 2 of the Revised Statutes; and by section 14, fourteen days' notice of the time and place of presenting the petition is to be served. If a discharge be granted, the debtor has a right to be released from imprisonment, whether in close custody or on the limits. The idea that he is only entitled to be discharged from imprisonment if in close custody, but has no such right if on the limits, is against the avowed design and purpose of the statute, and, as it seems to me, clearly untenable. The supreme court considered its general application so clear, that, in *Russell agt. Carpenter* (9 Wend. 462), it ordered an *exoneretur* to be entered on the bail-piece. If, notwithstanding the debtor has obtained a discharge, the sheriff refuses to discharge him, the debtor, by section 46 of that act, may bring a writ of *habeas corpus* or *certiorari*, to obtain a discharge from custody.

We think it quite clear, that a person charged in execution and held in custody by virtue of it, whether within the walls of the jail building or on the limits, is in prison, and is a person *imprisoned*, within the meaning of that word as used in article 6 of 2d Revised Statutes, p. 31, and that the order appealed from should be reversed.

We doubt whether the court at general term can make an order which will reinstate the proceedings. It is, clearly, more safe for the defendant to begin *de novo*.

Order appealed from reversed.

People *ex rel.* Lord agt. Robertson.

SUPREME COURT.

THE PEOPLE *ex rel.* WILLIAM G. LORD and others, appellants agt. WILLIAM H. ROBERTSON, county judge of Westchester county, respondent.

Where an *insolvent debtor*, previous to his imprisonment on a *ca. sa.* in the county jail, had been convicted of *forgery*, and under his sentence had served out his term of imprisonment in the state prison, never having been pardoned:

Held, that he was thereby *disqualified* from making an *affidavit to his petition* for his discharge from imprisonment under the insolvent laws.

It is competent for *any parties* to join as *relators in a certiorari*; and if it appears from the return that the officer had *no jurisdiction*, it is immaterial how that fact was shown, or by whom the objection was made.

Second District General Term, November, 1863.

LOTT, EMOTT and SCRUGHAM, *Justices.*

On the 30th day of December, 1856, Charles B. Huntington was convicted of forgery at a court of special sessions, and sentenced to state prison for a period of years, which he served out. After the expiration of his term of service, the relator Lord obtained judgment against him, and an order of arrest having been granted in the action, he was charged in execution against his person in the county of Westchester. He thereupon presented a petition under the insolvent laws, for the discharge of his person from imprisonment, to the respondent, and annexed thereto his affidavit. On the return of the order to show cause, the creditors, Lord, Belden and others, among other objections claimed that Huntington, not having been pardoned, was incompetent to make the necessary affidavit. The county judge overruled the objection, and granted a discharge. The relators sued out a *certiorari* to this court, which was argued at the July term, 1863, and decided October, 1863.

P. J. JOACHIMSEN, JOHN A. GODFREY, and MILLS & COCHRAN, *counsel for relators.*

JOHN J. CLAPP, *counsel for respondent.*

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By the court, LOTT, Justice. The conviction of Huntington for a felony and the sentence under it disqualifies him from making the affidavit annexed to his petition.

It is declared by statute (2 R. S. 701, § 23) that "no person sentenced upon a conviction for a felony shall be competent to testify in any cause, matter or proceeding, civil or criminal, unless he be pardoned by the governor or by the legislature, except in the cases provided by law." The disqualification is general. It extends to all cases where the declaration of the party is to be used in a judicial proceeding for the purpose of establishing or proving some fact; and it applies both to written and oral evidence. It is not limited to testimony or evidence on the trial of causes between parties, but in terms applies to all matters civil or criminal. The provision is intended as a rule of evidence, and as protection to the community against the peril of testimony from a person guilty of an offence implying such dereliction of moral principle as in the opinion of the legislature to carry with it the presumption of a total disregard to the obligations of an oath.

Insolvent proceedings are very important in their consequences, extending, in some cases, to the absolute discharge of debts, and in others limiting parties in the remedies for their collection, and affidavits of the applicant are required, of more or less stringency, to guard against fraud, and for the protection of the rights of creditors to be affected by them.

There is, therefore, as much if not more reason for disqualifying a person convicted of a felony from making such an affidavit, as there is to disqualify him from being a witness on trial of a cause between third persons.

The effect and extent of the disability created by the statute of a similar character in England was discussed and considered *in re Sawyer* (2 *Adol. & Ellis, N. S.* p. 721), and it was held to extend to an affidavit which had been used to show cause against a rule calling upon another party to

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answer certain matters; and the court ordered the affidavit to be taken off the files. (*See also 1 Greenleaf on Evidence, § 374.*)

The county judge, to whom the petition with this affidavit was presented, assigned a day for showing cause against the discharge of the applicant; and at the time designated certain of his creditors insisted, among other grounds as an objection to his discharge, that he had not been pardoned, and produced in evidence the record of his conviction for a felony.

The objections were overruled and the proceedings were continued, and resulted in the discharge asked for.

Having come to the conclusion that it was incompetent for the applicant to make the affidavit on which these proceedings were granted, it follows that they were unauthorized and void, and they must be set aside, if they are properly brought before us by the *certiorari*.

Huntington's application is said in the writ to have been presented to the county judge on the 18th day of March, 1862, whereas it appears by his return made thereto that the petition was dated the 21st day of May, 1862, on which day the affidavit annexed thereto was sworn to, and the order to show cause was made; and it is insisted on behalf of the respondent that the proceedings before the court are not those required to be returned, and that no judgment can be rendered thereon; and it is also insisted that Lord, one of the relators, did not raise the objection against the sufficiency of the affidavit, and therefore cannot join with the others in the *certiorari*.

We are of opinion that neither of these objections is tenable.

The judge has made his return, as he says, in pursuance and by virtue of the said writ, and it must be presumed that the proceedings returned are those had before him, and that the statement therein, as to the time of presenting the

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petition, is a mistake, and, as a full return has been made, the mistake is immaterial.

As to the alleged misjoinder of the relators, we are of opinion that it is competent for any parties to join in the *certiorari*, and if it appears from the return, as in this case, that the officer had no jurisdiction, it is immaterial how that fact was shown, or by whom the objection was made.

It follows, from these views, that the discharge was improperly granted, and that the proceedings should be set aside and reversed.

NEW YORK SUPERIOR COURT.

WILLIAM W. NILES agt. LUDLOW A. BATTERSHALL.

No *undertaking* is necessary on an appeal from the *special term* to the *general term* of this court, to sustain the appeal.

But if a *stay of proceedings* is desired by the appellant, he must either obtain an *order of court* for that purpose, or he must file and serve, with the *notice of appeal*, a copy of an *undertaking* as required on an appeal to the court of appeals.

New York Special Term, October, 1863.

JUDGMENT having been entered in this action against the defendant, on the 18th August, 1863, he, on the 21st September, appealed therefrom to the general term, by the service of a notice of appeal on the plaintiff's attorney and on the clerk of the court. The plaintiff's attorney refused to receive the notice of appeal, on the ground that an *undertaking* had not also been filed and served. On the 29th September an *undertaking* was filed and a copy served on the plaintiff's attorney, which he returned, because too late. On the 30th September the notice of appeal and copy *undertaking* were again served on the plaintiff's attorney, who again refused to receive them.

The motion is for an order staying proceedings on the judgment pending the appeal; setting aside any execution

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which may have been issued upon the judgment, and for leave to file the undertaking *nunc pro tunc*.

R. W. TOWNSEND, *for defendant.*

NILES & BAGLEY, *for plaintiff.*

MONELL, Justice. The service of the notice of appeal on the 21st September (it having been conceded on the argument that it was in time) was sufficient to perfect the appeal. No undertaking is necessary in an appeal from a special to a general term of this court. The refusal, therefore, of the plaintiff to receive it was irregular. To stay proceedings on the judgment appealed from, the appellant must either obtain an order from the court for that purpose, or he must file and serve an undertaking as required on an appeal to the court of appeals (*Code*, § 348); and it seems such undertaking must be filed and a copy *served with the notice of appeal*. The undertaking, therefore, which was served on the 29th September was too late. (*Code*, § 340; *N. Y. Central Ins. Co. agt. Safford*, 10 *How. Pr. R.* 344; *Cushman agt. Martin*, 13 *id.* 402.)

There is no reason given in the moving affidavit for not serving the undertaking with the notice of appeal, and I am unable, therefore, under the authority of *N. Y. Central Ins. Co. agt. Safford (supra)* to give the defendant the relief he asks for on this motion.

Upon furnishing a sufficient excuse for omitting to serve the undertaking at the time required, the court may relieve the appellant, and upon proper terms grant him a stay of proceedings. (*Code*, § 327.)

The appellant can go on with his appeal, his notice being sufficient for that purpose; but as the case now stands he cannot have a stay of proceedings. (*Cushman agt. Martin, supra.*)

The motion is denied, without costs.

Iselin agt. Graydon.

NEW YORK SUPERIOR COURT.

ADRIAN ISELIN and another agt. Wm. GRAYDON and others.

A plaintiff is not entitled to an *extra allowance of costs*, on obtaining judgment against the defendant, although an *attachment* was issued in the action and served upon the defendant, where the defendant shows that the attachment pending the action was *set aside and vacated*.

New York Special Term, March, 1863.

THIS is an appeal from an adjustment of costs. An attachment against the property of the defendants had been granted by a judge of the court. On motion at special term the attachment was vacated and set aside. On appeal to the general term the order vacating the attachment was affirmed. The plaintiffs having obtained judgment against the defendants in the action, the clerk allowed the sum of sixty dollars as an extra allowance to the plaintiffs under section 308 of the Code. That section gives an extra allowance to the plaintiff "upon a recovery of judgment by him, in an action * * * in which a warrant of attachment has been issued;" and it is claimed that the plaintiff is entitled to the item, notwithstanding his attachment has been set aside.

— — —, for plaintiffs.

— — —, for defendants.

MONELL, Justice. The literal reading of the section certainly admits of the construction claimed by the plaintiffs; but this statute, like all other statutes, must be interpreted by the intention of the legislature. An attachment against property is a provisional remedy, designed to secure the property of the defendant to answer the judgment of the plaintiff. It is issued *ex parte*, upon the application of the plaintiff, in any action for the recovery of money, in the cases provided in sections 228, 229 of the Code. The

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grounds upon which it is granted form no part of the cause of action against the defendant, and it is not necessary in procuring the judgment. The object of the extra allowance was to make compensation to the plaintiff for the extra labor in procuring the provisional remedy. If, however, the warrant was improvidently issued, or if the defendant, on a motion to set it aside, can make it appear that it should not have been issued, and the court accordingly set it aside, then the case stands as if the warrant had not been issued. The legislature never could have intended to give a plaintiff this extra allowance unless his attachment was sustained. When a warrant of arrest is vacated by the court, an execution against the person of the defendant cannot be issued under section 288, unless the complaint states a cause of action which of itself would authorize an arrest. Any other construction would place it wholly in the power of a plaintiff, in any action, to claim the extra allowance by merely obtaining a warrant of attachment, and which warrant may have been procured upon false affidavits.

In order to entitle a plaintiff to the allowance, he must not only obtain the attachment, but it must also be sustained.

In this case, the attachment having been set aside, the plaintiff is not entitled to the allowance, and it should have been disallowed by the clerk.

It must be referred back to the clerk for readjustment.

GEORGE W. POWERS and others agt. SAME DEFENDANTS.

Same decision.

Hosley agt. Black.

COURT OF APPEALS.

ALBERT HOSLEY, respondent agt. JAMES W. BLACK and WILLIAM B. GARDINER, trustees of school district No. 12 in the towns of Almond and Hornellsville, appellants.

Although the technical rule is, that under a complaint setting out a contract, and averring its performance by the plaintiff, *evidence in excuse for non-performance is not admissible*, yet, under the Code, the plaintiff may amend his complaint, and then give the evidence.

The old count of *indebitatus assumpit* for work and labor was always sufficient to authorize a recovery for work and labor performed *under a contract not under seal*; and the Code has not changed the former rule of pleading, that a party who has *wholly performed a special contract* on his part, may count upon the *implied assumpit* of the other party to pay the stipulated price, and is not bound to *declare specially upon the agreement*.

Where a complaint shows upon its face that the action was brought against *two trustees*, the objection that a *third trustee* should have been made a defendant is waived, if not taken by *demurrer or answer*.

The rule is, if an *offer of evidence* contains *any matter not admissible* as evidence, the *whole may be rejected*.

Where the *contract declared on* is *in writing*, no condition can be engrafted upon it by *parol evidence*.

Argued June Term, 1863; decided October, 1863.

THIS action was brought to recover for nine months' services, rendered by plaintiff (his wife assisting him) in teaching a school, in school district No. 12, in the towns of Almond and Hornellsville, at the prices of fifty dollars per month for the first three months, and sixty dollars per month for the last six months. It was tried at the Alleghany circuit in March, 1858, when the plaintiff proved that he first taught the school thirteen weeks (his wife acting as assistant teacher), commencing April 21, 1855, not opening the school, however, on any Saturday except the first, at the price, verbally agreed upon, of \$50 per month, and that he then closed the school for a vacation, and made out a rate bill for that term for the trustees, and at their request; that he (his wife acting as assistant) taught the school six months more, at \$60 per month, pursuant to an

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agreement in writing, signed by the trustees. He commenced the last six months on the first of September, 1856, and kept the school twenty-six weeks, Saturdays excepted. He gave evidence which authorized the conclusion that the trustees consented that his time should go on, counting Saturdays, though he did not open the school on those days. This evidence was objected to by the defendants on the ground that it was not competent to show a waiver of the performance of the contract under the allegations of the complaint. But the judge overruled the objection (the complaint containing the common counts), and the defendants' counsel excepted.

It appeared that the plaintiff's wife was absent Monday mornings, washing until ten or eleven o'clock in the forenoon, and "a few days while sick;" that the plaintiff himself was absent one day, attending a Buchanan mass meeting, and two days before the board of supervisors as a candidate for county commissioner of common schools, his wife keeping the school in his absence.

The defendants and one Osgood were trustees of the school district (as appeared by the testimony of the latter) until the last Tuesday of September, 1856, when Washington Richardson succeeded Osgood as trustee. But at the time the action was commenced, Richardson had moved to the state of Ohio, and the defendants were then the trustees of the district.

The non-joinder of Richardson as a defendant in the action was not set up in the answer; nor was any objection taken in the answer that two trustees were sued alone, without the presence of a third one.

When the plaintiff rested, the defendants moved for a nonsuit, on the ground that the plaintiff had failed to fulfill his agreement to teach either the first three months or the last six months; and also "demanded a dismissal of the action on the ground that Thomas Richardson, the present trustee in the district, should be brought in as defendant."

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The judge denied the motion, and the defendants' counsel excepted.

No evidence was given that Thomas Richardson was a trustee of the district; and the case does not show that the plaintiff conceded that he was a trustee.

The plaintiff testified, on his cross-examination, that the verbal agreement to teach the school the first three months was made about the 15th day of April, 1856; that after it was made, and before he commenced the school, a subscription paper was circulated by him and others about the district; which paper was as follows:

“Whereas it is necessary that a district school should be supported in school district number 12, in Almond village, the ensuing summer; and whereas the trustees of said district propose to employ A. Hosley and a competent assistant to teach said school, for three months, at \$50 per month for said teacher and assistant, applying the remainder of the public moneys in payment thereof—remainder by rate bill; and whereas it is apprehended their attendance at said school may cause the said rate bill to be unreasonably onerous upon those who send regularly during said term;—now, therefore, we, the undersigned, inhabitants of said district, in consideration of the establishment of said school and the signing of this instrument, hereby agree with said trustees and with each other, that the rate bill may be made out against us for the regular daily attendance of the number of scholars, set by us opposite each of our respective names, during the whole of said term. This agreement to be of no effect unless scholars to the number of eighty be subscribed to this agreement. Dated April 20th, 1856. Names. Scholars.”

This agreement was signed by different inhabitants of the district; but only sixty-four scholars were subscribed for.

The defendants, under allegations in their answer, first offered to prove that the plaintiff admitted that he was not to have the school and no school was to commence

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until eighty scholars were signed to the written agreement for scholars circulated by him ; that the terms of a scholar should not be over \$1.25 for said first term of three months ; that he represented to each one of the patrons of the school, that such should be the price ; there was to be no school until eighty scholars were signed ; that in order to commence his school he had himself signed and would be responsible for eleven scholars to make up the number ; that he stated to others, while circulating the agreement, they need only to sign and he would clear them from any liability for the said subscription ; that he only desired their names so as to induce others to sign.

The case states, that " to each and every of which propositions, and each part thereof, the plaintiff objected severally, and each of said objections was sustained, and the defendants duly and severally excepted to said rulings and each of them."

The defendants secondly offered to show that it was a condition of the contract for the last six months that the teacher should keep up the school to eighty scholars for the first three months, and that by reason of plaintiff's representation that the scholars attending had averaged eighty for the first three months, the trustees were induced to sign the written agreement to employ him for six months, and that in fact the number of scholars during three months was but thirty. This evidence was objected to by the plaintiff's counsel, and excluded ; and the defendants' counsel excepted.

The defendants' third offer was to prove that the said rate bill amounted to three dollars per scholar ; that the plaintiff, in conversation with each of the patrons of the school, inquired of by them as to the reason of their being compelled to pay \$3 instead of \$1.25 per scholar, as stated by him to them before the commencement of his second term, stated to them and each of them that when he procured their support to the school and signature to said

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paper for that purpose, that he did not intend to regard the same or carry out his said promises, but to induce them to support said school by any means whatever; that he intended to deceive them; that he intended to be smart enough for the citizens of Almond, and meant to get them tight; that he had got their written contract, and they might help themselves; that all he intended was to get them fast, and he had got them; that the plaintiff, when called upon in public school meeting in relation thereto, made each of the above statements publicly to the patrons of said school; that in consequence of the conduct and language used by the plaintiff in relation to said inhabitants, they refused to send to said last term of said school, and thereby said school was of no benefit or advantage to said district; that each of said trustees, at the end of the plaintiff's first month, offered him payment for the time taught, and fifty dollars besides, if he would discontinue the school; that he then stated to them and each of them that he was going according to law, and asked no odds of them.

The case states, that to each and every of which propositions, and to every part thereof, the plaintiff objected; that the judge sustained the objections, and the defendants excepted to each of said rulings.

The counsel for both parties concurred that there was no question of fact for the jury, except as to the performance of the agreement, or no conflict of evidence as to that; and the defendants' counsel waived the right to submit that question to the jury, and the parties agreed that \$404.38 was the amount remaining unpaid according to the agreement respecting the plaintiff's compensation; and the judge directed a verdict for that sum in favor of the plaintiff. To which direction the defendants' counsel excepted.

The defendants' counsel made a case containing the exceptions, on which he moved for a new trial at a general term of the supreme court in the eighth district; which

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motion was denied, and judgment was there rendered against the defendants for the amount of the verdict, with costs. The defendants appealed from the judgment to this court.

The case was submitted upon printed points and briefs.

JOHN K. PORTER, *for respondent.*

M. H. WYGANT and E. PESHINE SMITH, *for appellants.*

BALCOM, J. The objection to the evidence given by the plaintiff, to show that the defendants consented that Saturdays should be counted in ascertaining the length of time the plaintiff taught the school, was placed upon the ground that it was not competent to show a variance of the performance of the contract to teach the school, under the allegations of the complaint.

The technical rule undoubtedly is, that under a complaint setting out a contract and averring its performance by the plaintiff, evidence in excuse for non-performance is not admissible. (*Oakley* agt. *Morton*, 1 *Kern.* 25.) But this rule is of very little consequence; for the plaintiff may amend his complaint and then give the evidence. (*Code*, § 173; *Dauchy* agt. *Tyler*, 15 *How. Pr. R.* 399.) It is true, that he must submit to such terms "as may be proper;" but terms are not often imposed, for they are seldom necessary in the furtherance of justice.

In this case no amendment of the complaint was necessary to entitle the plaintiff to give the evidence excusing him from opening the school on Saturdays. The complaint contains seven distinct claims or counts, three of which are similar in substance to the count of *indebitatus assumpsit* for work and labor, used prior to the Code of Procedure. That count always was sufficient to authorize a recovery for work and labor performed under a contract not under seal, unless the party performing the work and labor had failed to fulfill the contract. (4 *Wend.* 285; 11 *id.* 479; 22

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id. 576; 1 *Cow. Tr.* 2d ed. 124; 2 *id.* 635 and 1128.) This court held, in *Farron* agt. *Sherwood* (17 *N. Y. R.* 227), that the Code has not changed the former rule of pleading; that a party who has wholly performed a special contract on his part may count upon the implied assumpsit of the other party to pay the stipulated price, and is not bound to declare specially upon the agreement. The same rule was held in the following cases: *Allen* agt. *Patterson* (3 *Seld.* 476); *Keteltas* agt. *Myers* (19 *N. Y. R.* 231); *Moffet* agt. *Sackett* (18 *id.* 522).

The plaintiff taught the school thirteen weeks for the first three months, and twenty-six weeks for the last six months. This was time enough to make the two terms, construing the word month to mean a calendar and not a lunar month, as the statute seems to require. (1 *R. S.* 606, § 4.) The fact that the plaintiff's wife was absent Monday mornings washing till ten or eleven o'clock in the forenoon, and a few days while sick, and that the plaintiff himself was absent one day attending a Buchanan mass meeting, and two days before the board of supervisors as a candidate for county commissioner of schools, his wife keeping the school in his absence, was not a substantial breach, by the plaintiff, of the contract to teach either three months or six. This was a trifling matter. The school was kept during the time either the plaintiff or his wife was absent. Both were not away at the same time, and the attention of the judge was not particularly called to these absences at the trial; nor was it shown during which term they occurred. I am therefore of the opinion the judge was right in holding that the plaintiff performed the contracts on his part.

The defendants were the only trustees of the school district at the time the action was commenced; and there was no evidence given that Thomas Richardson had become a third trustee at the time of the trial, and it was not conceded by the plaintiff that he was such trustee.

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The complaint showed upon the face thereof that the action was brought against only two trustees. But the defendants did not demur to it on that ground, or object in their answer on that ground to the plaintiff maintaining the action. The objection that a third trustee should have been made a defendant was therefore waived. (*Code*, § 144; *id.* 147.)

The first offer of evidence by the defendants embraced matters which were clearly inadmissible. That the plaintiff stated to others, while circulating the agreement in regard to the number of scholars, they need only to sign and he would clear them from liability for signing, and only desired their names so as to induce others to sign, was matter that did not concern the defendants. Every person who signed that agreement bound himself, if at all, according to the terms of it. But a sufficient number of scholars was not subscribed for, to make it operative. The representations therefore made to the persons who signed it were wholly immaterial to the defendants. And the rule is, if an offer contains any matter not admissible as evidence, the whole may be rejected.

The second offer contained the proposition that it was a condition of the contract for the last six months that the plaintiff should keep up the school to eighty scholars for the first three months. The contract for the last six months was in writing, and no such condition could be engrafted upon it by parol evidence.

The third and last offer contained this matter, namely: That each of the trustees, at the end of the plaintiff's first month, offered him payment for the time taught and fifty dollars besides, if he would discontinue the school. This certainly was not legal evidence against the plaintiff.

It is unnecessary to determine whether any portion of the matter contained in the three offers made by the defendants would have been admissible, if the same had been separately offered; for each offer, as we have seen, con-

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tained matter which was not legal evidence against the plaintiff. And this is a sufficient reason for sustaining the decisions of the judge rejecting the whole of each offer.

I will add, that it does not appear by the case, nor was there any offer to prove, that the defendants did not know the number of scholars actually subscribed for upon the agreement of April 20th, 1856, at the time they made each of the contracts with the plaintiff to teach the school; and without ignorance on their part respecting the number of scholars actually subscribed for, no fraud could have been practiced on them by any false representations of the plaintiff as to the number so subscribed for.

My conclusion is, that no error was committed on the trial, and that the judgment of the supreme court in favor of the plaintiff should be affirmed, with costs.

DENIO, Ch. J., MARVIN, WRIGHT, DAVIES, ROSEKRANS and EMOTT concurred.

SELDEN, J., read an opinion for reversing the judgment and granting a new trial, in which he held that some of the evidence offered by defendants' counsel was improperly excluded.

Judgment affirmed, with costs.

NEW YORK SUPERIOR COURT.

MARIA ANDERSON, respond't agt. PATRICK DICKIE, appell't.

The owner of real property in a city, who makes a *coal vault* under the side-walk opposite the premises, for his own convenience, is not relieved from liability for injuries received by a citizen, who, in passing over it with ordinary care, falls through an *insecure circular grating* leading to such vault, although he has demised the premises to a tenant who had had for several years and then was in possession of the premises; and although there was some evidence to show that at the time of the accident such grating was left out of its place by the tenant, who had just previously used it.*

* NOTE.—A query seems to arise in this case upon the evidence: That is, what effect, if any, should be given to the fact that the *circular grating* in the side-walk had been there *thirty-nine years*, during the ownership of the premises by the de-

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*Heard General Term, Oct., 1863; decided Nov. 14, 1863.
Before MONCRIEF, ROBERTSON and MONELL, Justices.*

Statement of facts, by the appellant:

THE plaintiff sues to recover damages sustained by her in consequence of injuries received by her on the 12th June, 1862, by stepping into a vault-hole in front of premises Nos. 68 and 70 Lispenard street, owned by defendant. The defendant admits ownership of premises, and of vault being in front of said premises, but denies all the other allegations of the plaintiff, and says said vault-hole was well built, in good condition, and covered by a strong, substantial cover, which was well secured in its place. That on the first May, 1862, he parted with the possession of basement and vaults of said premises, with said vault-hole and cover, to a tenant for one year from May first, 1862, to first May, 1863, and the same was in the occupancy of a tenant, and not in the possession of the defendant, at the time of the receiving of the injury by plaintiff.

The statement of facts by the respondent was, that:

On the 12th day of June, 1862, the defendant was, and for thirty-nine years prior thereto had been, the owner of the building at the corner of Broadway and Lispenard street, known as Nos. 68 and 70 Lispenard street.

The defendant, without authority of law, had constructed and continued for his private use a vault under the part of the public street known as the side-walk, adjacent to said building, during that time.

On the first day of May, 1862, he let the basement and

fendant, in the same condition, and without any complaint or previous accident; whether it should not be considered *prima facie* evidence, at least so far as the defendant is concerned, that it was *secure as against the public* when the defendant had given evidence to show that it was left out of its place by the tenant when this accident happened? This, although a question for the jury, would seem to require proper instructions from the court.—R.E.P.

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vaults under the side-walk to one James Walnut. What the agreement between him and Walnut was does not appear.

At the time he let the premises to Walnut, there was no fastening on the grate to prevent its being moved in its bed, but the same was loose and in a dangerous condition, and had been for a long period prior thereto.

The defendant, at the time of the accident, occupied a portion of the premises, and other portions of the same were occupied by several other tenants.

On the 12th day of June, 1862, the plaintiff, while passing along Lispenard street in a proper and orderly manner, stepped on one of the defective grates used to cover a vault-hole on the premises in question, and fell through, inflicting severe injuries to one of her limbs, from which she had not recovered at the time of the trial.

Shortly after the accident, the defendant repaired the grating at which the accident occurred, and put a cross-bar and chains on it, and fixed it securely, so that it could not be moved in its bed.

The jury found a verdict for the plaintiff for \$750, upon which judgment was entered on the 28th of March, 1863, from which judgment and an order denying a motion for a new trial this appeal is taken.

On the trial, the appellant claimed that the following facts were shown :

That the premises were in the occupation of a tenant ; that the plaintiff was walking through Lispenard street on the 12th June, 1862, when she stepped into the opening above the coal-vault, and was injured, and was attended by a doctor ; that the same tenant occupied the premises between three and four years, and used the vault-hole in taking coal in ; that he uncovered the hole about once, twice or three times a week to take in coal ; and there was no difficulty about the vault or grating up to the occur-

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rence of this accident ; that when the grating was in its bed it could be walked over and pressed upon in any way from the outside without disturbing it, and that it could not be moved by stepping on it ; that on the day the accident occurred, the grating had been removed and coal put through the hole into the vault, and that the coalman did not put back the grating. There was no evidence of any knowledge, notice or suspicion on the part of the defendant that the grating was out of order ; none that the tenant had replaced the grating after having lifted it in order to put in coal, but evidence to the contrary ; none that defects of structure in any manner contributed to the accident ; but there is positive proof that at the time of the accident the grating was not in its bed, and that the tenant was in the habit of leaving the grating off after putting in coal.

BENEDICT & BOARDMAN, *attorneys, and*
A. BOARDMAN, counsel for appellant.

I. The motion to dismiss the complaint should have been granted.

1. The premises were, at the time of the accident, in the possession of the tenant, and he was *prima facie* liable. (*Eakin agt. Brown*, 1 *E. D. Smith R.* 36 ; *Mayor agt. Corlies*, 2 *Sand. R.* 301.)

2. The evidence showed that the tenant had used the opening for the purpose of putting in coal, and there is no evidence to show that he had replaced the grating in its bed.

3. If the tenant, as the presumption is, did not replace the grating in its bed after using it, he, and not the defendant, is liable.

4. The burden of proof is on the plaintiff, and she was bound to give some evidence that the accident *was*, not merely that it *might have been*, occasioned by defects of structure. "In cases of torts it is necessary to show that

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the particular damage in respect of which the plaintiff proceeds, must be the legal and natural consequence of the wrongful acts imputed to the defendant." (*Butler agt. Kent*, 19 *Johns. R.* 223.)

5. No defect or perfectness of structure could have had any effect in producing or preventing an accident, if the grating was not properly restored to its bed after being taken off.

6. There was no proof of any relation between the defects of structure and the accident, and consequently nothing to go to the jury.

7. Any verdict rendered on the plaintiff's evidence would be set aside as against the weight of evidence, and it is the judge's duty to nonsuit where a verdict for the plaintiff would be against the weight of evidence. (*Wilds agt. Hudson R. R.* 24 *N. Y. R.* 430; *S. C.* 23 *How. Pr. R.* 492.)

8. The judge is not justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence in the defendant. (*Colton agt. Wood*, 99 *Eng. Com. Law*, 566, *cited with approbation in the above cases.*)

II. The carelessness of the plaintiff contributed to the injury, and therefore the defendant is not liable. (*Wilds agt. H. R. R. R. supra.*)

III. The judge erred in refusing to charge "that a landlord, during the tenancy, gives up entirely to the tenant the premises demised, and has no right to enter them for any purpose. His entering is permissive only, like that of any other person. If he enters without leave he is a trespasser."

IV. The judge erred in refusing to charge "that the defendant cannot be held liable except for negligence of his own. He is not in any respect responsible for the negligence of his tenants."

V. The judge erred in refusing to charge "that if the accident could not have happened provided the grating

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had been properly placed in its bed, the landlord is not liable in the absence of proof that he had anything to do with its displacement."

VI. The judge erred in refusing to charge "that if the accident happened by reason of the tenant not replacing the grating in its bed after taking the same away, the landlord is not liable for the injury."

VII. The judge erred in refusing to charge "that it is the business of the tenant, and not of the landlord, to fix the grating into its bed after using it."

VIII. The judge erred in overruling the objection raised to the question, "What is the probability of her recovery from that injury—is it a permanent one, or one that she will be likely to recover from?" (*Curtis agt. Rochester & Syracuse R. R.* 18 N. Y. 534; *Morehouse agt. Mathews*, 2 Coms. 514; 1 *Phil. Ev.* 290; *Kellogg agt. Totten*, 16 Abb. *Pr. R.* 25.)

IX. The judgment of the special term should be reversed.

IRA D. WARREN, *counsel for respondent.*

I. The first exception at folio 25, "as to whether the injury was permanent, or one that she would be likely to recover from," is not well taken. It was proper on the question of damages. (*Caldwell agt. Murphy*, 1 *Duer*, 233; *id.* 11 N. Y. 416; *Curtis agt. R. & S. R. R. Co.* 18 N. Y. 534; *Lincoln agt. The S. & S. R. R. Co.* 23 *Wend.* 425.)

II. The court properly denied the motion to dismiss the complaint. The case shows that the defendant, for his own benefit, had constructed and continued vaults under the public street without any special authority, and had continued the same for thirty-nine years; and that the injury occurred by reason of the imperfect manner in which such vault was covered and protected.

The rule is well settled, that where a party appropriates any portion of the street or highway to his own use, he is

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bound at his peril to keep it in such a condition that it is as safe as before. And even the fact that it has been rendered unsafe by the act of a stranger will not relieve him from liability where the party injured was free from negligence. (*Congreve* agt. *Smith*, 18 N. Y. 79; *Congreve* agt. *Morgan*, 18 N. Y. 84; *Dygert* agt. *Schenck*, 23 Wend. 446; *Harlow* agt. *Humiston*, 6 Cow. 191; *Angell on Highways*, § 223; *Bac. Abr. Highways*, D.)

The evidence shows that the defendant was guilty of negligence in not having this defective grate properly secured. (*Curtis* agt. *R. & S. R. R. Co.* 18 N. Y. 534.) There is an entire absence of any evidence of negligence on the part of the plaintiff, and the judge would not have been warranted in taking the case from the jury. (*Johnson* agt. *H. R. R. R. Co.* 5 *Duer*, 21; *Oldfield* agt. *N. Y. & Harlem R. R. Co.* 14 N. Y. 314; *Williams* agt. *O'Keefe*, 24 *How. Pr. R.* 19.)

She was walking in the highway of the city, upon the belief and assurance that it was in a safe and proper condition to be traversed, and as a matter of law was justified in relying upon that belief. (*Dargie* agt. *Magistrates, &c.* 27 *Scottish Jurist*, 311; *Hay on Liability*, 208, 215; *Davenport* agt. *Ruckman*, in this court transcript, Dec. 3d, 1862; 24 *How. above cited*, 19.)

She had a perfect right to suppose there was no danger in passing along the side-walk, and it could not have been expected that she should watch at every step for some defective and dangerous grate or flagstone, which the law does not permit.

It was not possible for her to exercise any positive skill or care to avoid a danger which she had no cause to suppose existed. Such a proposition presupposes a previous knowledge of the danger, which the evidence shows she had no knowledge of.

All that could be required of her, was to conduct herself with propriety, and use the side-walk as it was intended to

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be used, and she was entitled to an unobstructed passage along every portion of it. (*Ang. on Highways*, § 226.)

If it had appeared that she previously knew of this defective grate, perhaps some positive evidence would have been required of the exercise of care.

The court will not presume negligence in the absence of evidence. (*Johnson* agt. *H. R. R. Co.* 5 *Duer*, 25; *Button* agt. *id.* 18 *N. Y.* 252; *Johnson* agt. *H. R. R. Co.* 20 *N. Y.* 65.)

This case is different from that where a person puts himself in the way of a legalized danger—as a crossing on a railroad track—for that which is authorized by an act of the legislature cannot be a nuisance. (*First Baptist Church* agt. *U. & S. R. R. Co.* 6 *Barb.* 318.)

Whatever the law authorizes a person is presumed to know, and, if attended with danger, under obligation to use care and diligence to avoid; but a person is not presumed to know that which exists in violation of law—such as a public nuisance arising from an act done to a highway which detracts from the safety of travelers. (24 *How.* 19; *Justice MONELL's opinion*; *Burrill's Law Dictionary*, vol. 2, p. 587; *Broom's Legal Maxims*, 122; 3 *Bl. Com.* 215; 4 *Bl. Com.* 27.)

The defendant let the premises to Walnut, with this grate in a defective and dangerous condition, and on that ground alone is liable for any injury resulting to third persons by reason thereof. (*Taylor's Landlord and Tenant*, p. 109, § 175; *Brown* agt. *C. & S. R. R. Co.* 2 *Kern.* 487; *Corporation Revised Ordinance*, 1857, p. 259, § 16.)

III. The first proposition or request to charge was properly refused, except as his honor the judge had already charged.

There was no lease in evidence in this case, showing what the terms of the letting to Walnut were. (3 *Graham and Waterman on New Trials*, 711, 795.) The jury had a right to infer, from the fact that the defendant did go on

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the premises and repair them after the accident, that it was his business to repair. This evidence rebuts any presumption that it was the tenant's duty to repair.

A landlord, during the tenancy, has a right to go upon the premises peaceably for certain purposes, viz: "To demand rent, to use all ways appurtenant thereto, to make such repairs as are necessary to prevent waste, or to remove obstructions." (*Taylor's Land. and Ten.* § 174, p. 108.)

The judge could not therefore charge in the terms of the request without qualification, and his refusal to charge as requested was no error. (*Bazley* agt. *Smith*, 6 *Seld.* 489, 499; *Carpenter* agt. *Stillwell*, 1 *Kern.* 61; *Kernan* agt. *Rocheleau*, 6 *Bosw.* 148; *Magee* agt. *Badger*, 30 *Barb.* 246; *Gardner* agt. *Clark*, 17 *Barb.* 538.)

We are not able to see how the fact, if it was true, that the defendant had let the premises to another party in such a way as to preclude him from entering thereon, could affect the rights of the plaintiff, as he let them with this dangerous and defective grate, and received rent for its use.

"It was the defendant's duty to know that the side-walk over his vault was safe." The plaintiff had a right to presume it was. (*Cases under Point II*; *Ryan* agt. *Fowler*, 24 *N. Y. R.* 414.)

IV. The second request to charge was properly refused, except as it was charged, as there is no evidence to support it. There was no lease in evidence, nor any agreement proved, containing any such provisions, and such a charge would have been improper. (*Mayor of New York* agt. *Price*, 5 *Sand.* 542; *Kernan* agt. *Rocheleau*, 6 *Bosw.* 148; *Rushmore* agt. *Hall*, 12 *Abb.* 420.)

This building was occupied by several tenants. The defendant himself occupied a portion of it, and the jury having found that the accident occurred, not by negligence in the use of the grate, but by its careless and negligent construction, the defendant is liable. (*Eakim* agt. *Brown*, 1 *E. D. Smith*, 36.)

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V. The sixth, seventh and eighth requests were charged, we submit, in stronger terms than the defendant's request.

These requests all amount to the same thing, viz: Was it the tenant's or the landlord's negligence that occasioned the injury?—which question was submitted to the jury under proper instructions. Certainly under instructions more favorable for the defendant than the adjudged cases warrant. (*Cases under first part of Point II.*)

VI. No exception was taken to the charge, and we submit that every request to charge, which was in any way warranted by the evidence, or correct as a proposition of law, was fully and distinctly charged. The damages were small, as the injury was shown to be of a permanent character. She had not recovered from it at the time of the trial, and the testimony of the physician shows that it was of a serious nature.

VII. The evidence as to the improper construction of the grate is almost all against the defendant. The witness Walnut, who occupied the premises, swears there was no fastening on it for a period of four years previous to the accident.

He swears there was none on it when it was let to him on the first of May, 1862.

Martin swears, three months before the grate was loose and in a dangerous condition.

Moore swears, that the rust in the eye, where a fastening should be put, indicated that none had been on for a long time.

Dickie himself does not swear that there ever was a chain or fastening on that grate.

He swears that after he had put a chain on it, at the time he repaired it after the accident, it was not secure until he repaired it again, and put pins in it.

It could not therefore have been safe at the time of this occurrence, with neither pins nor chains on it.

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It cannot therefore be denied, that this grate was insecure and dangerous at the time, and for a long time prior to his letting of the premises to Walnut on the first of May, 1862.

This was the fourth grate from Broadway ; Dickie's witnesses all examined the third, so that there is no contradiction as to the condition of this grate.

VIII. The judgment should be affirmed, and the motion for a new trial denied.

By the court, ROBERTSON, Justice. The plaintiff was injured by falling through a circular aperture in the pavement of the street in front of Nos. 68 and 70 Lispenard street, in the city of New York, from which a passage descended into a vault adjoining such premises and used therewith. This opening passage and vault were there when the premises were let by the defendant to a tenant. Such aperture was covered usually by a loose, movable circular grating, sunk into a circular flange or socket cut into the flagging of the side-walk, on which it rested. It appeared in evidence that a chain, fastened to such grating and to a bar on the inside of the vault, would have added to the certainty that such grating would not be moved. It also appeared that a grating with prongs, with a double chain fastened to each side of the opening, and a flange projecting beyond the edge of the opening and resting on the pavement, would have been the most secure. The evidence as to the existence of any fastenings to such grating when the premises were let by the defendant, as to the possibility of tilting up the grating, if it was in its socket, and as to the condition of the fastening and grating at the time of the accident, was conflicting. There was some evidence to show that the grating had been displaced and left unreplaced by the tenant.

On the trial the defendant's counsel requested the court

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to charge the jury, among other things: 1st. That a landlord had no right to enter premises let by him, without the consent of the tenant. 2d. That he is not bound to make repairs when he lets such premises by a lease binding the tenant to leave the premises in as good a condition as when he entered. 3d. That he is only liable for his own negligence, and not for that of his tenants. 4th. That he is not liable unless proved to have had something to do with the displacement of the grating, where the accident could not have happened if it had been properly placed in its bed. 5th. That he is not liable if the accident happened by reason of the tenant's not replacing the grating in its bed after using the opening.

The learned justice who presided at the trial charged the jury: 1. That the law imposed upon the owner of property in a city, who used any part of a street for his private purpose, the duty of employing all necessary and proper means for the prevention of damages and injury that might arise from the use of such public street by him, and he is responsible for all injury resulting from the street being made thereby less safe for its proper uses when there is no negligence on the part of the party injured. 2. If the grating was insecure at the time of the happening of the accident in question, and that was occasioned by the negligence of the defendant, he is liable in this action; for, being the owner of property, he was bound to see that the grating was kept securely. 3. If the jury were satisfied, without the chain and bar the grating was entirely secure and free from liability to cause accidents to persons passing over it, the defendant was not guilty of negligence. 4. If the defendant did not resort to all necessary and proper means to render the grating secure, and its insecurity had existed and continued for a considerable time previous to this action, he is liable. 5. The law is answered by a landlord's using reasonable diligence, at the time of letting the property, to see that it is in good condition. 6. The

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defendant would not be liable if the grating had been secured by him previously, and the security had been removed by the tenant or any one else. The court refused to instruct the jury upon these points requested otherwise than it did in such charge, and the defendant's counsel excepted to such refusal.

It was not probably intended to be maintained on behalf of the defendant that the liability of the tenant would absolve him from all responsibility for the injury to the plaintiff. The creator of a nuisance, or one who more remotely, either by negligence or design, furnishes the means and facility for the commission of any injury to another, which could not have been done without them, is equally responsible with the immediate wrong-doer. (*Vandenburgh agt. Truax*, 4 *Denio R.* 464; *Thomas agt. Winchester*, 6 *N. Y. R.* 397; *McCahill agt. Kipp*, 2 *E. D. Smith's R.* 413.) So, too, if the defendant had never let the premises adjoining the vault, and the grating had been left in a condition to be easily moved by a stranger, and it had been so moved as to cause the injury in question, it would hardly be contended that the defendant was not liable for the injury to which he had contributed. The only question which remains, therefore, is, whether the defendant relieved himself from responsibility in such case by demising the vault and its appurtenances, with the insecure grating, to a third person?

It was held in the cases of *Congreve agt. Smith* (18 *N. Y. R.* 79), and *The Same agt. Morgan* (*id.* 84), that persons constructing an area in the highway are bound at their peril to keep it so covered that the way would be as safe as before the area was built, wholly irrespective of the covering being rendered unsafe by the wrongful act of a third party; which was followed by this court in the case of *Davenport agt. Ruckman* (*Gen. Term Superior Court*, 1863, *Nov.* 29). It may well be doubted whether, even if the defendant in this case had let the premises with the grat-

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ing over the vault-hole secured by only movable fastenings, he would not be responsible for injury caused by those fastenings being removed, where he parted with their possession and control. He could hardly be held to have discharged his duty to the public by leaving such traps as vault-holes, guarded against doing injury only by fastenings easily undone and intended to be undone constantly by the tenant, for which facility he may be supposed to have been receiving part of his rent. But if there were no fastenings, but merely a loose cover to the opening, he would still be more obnoxious to responsibility for its removal. The charge was more favorable to the defendant than he could ask, since it exempted him from liability if he used reasonable diligence to see that the premises were in good condition when he let them, and if the grating had then been secure. Although the security had been removed by another, it only made him liable in case the grating was insecure at the time of the accident by reason of the negligence of the defendant, and if he did not resort to all proper and necessary means to make it secure, and its insecurity had existed for a considerable time.

The request to charge as to the right of a landlord to enter premises let by him, if relevant, was too broad ; he can do so to prevent waste, and certainly to save himself from liability for leaving an exposed opening in the highway. It was not absolutely necessary that he should go on the premises to add a chain and fastening to the grating. There was no evidence of such a lease as was supposed in the second request, if there had been the addition of a chain and fastening to the grating. There was no evidence of such a lease as was supposed in the second request ; if there had been, the addition of a chain and fastening never before there, in order to prevent accidents, could hardly be called *repairs*. He was made liable only for his own negligence. The previous remarks dispose of the question of liability for the displacement of the grating

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by the tenants or a stranger, when facilitated by the negligence of the defendant, which is embraced in the remaining three requests to charge before specified.

There being, therefore, no error in the refusal to charge, the judgment must be affirmed.

CHAUTAUQUA COUNTY COURT.

TOWNSEND JACKSON, respond't agt. CHARLES ALLEN, appell't.

A notice of appeal from the judgment of a justice of the peace is not such *original process* as requires a U. S. revenue stamp; and if it does, it may be *amended* by the court, after review, by affixing the proper stamp thereto.

Jamestown, November, 1863.

APPEAL to the county court of Chautauqua county from a judgment rendered by a justice of the peace.

C. R. LOCKWOOD, *for respondent*, moved to dismiss the appeal, because no revenue stamp was affixed to the notice of appeal.

W. M. NEWTON, *for appellant.*

HAZELTINE, County Judge. This is a new question and of some importance, as many other appeals may be in a like condition. The act of congress, passed July 1, 1862, entitled "An act to provide internal revenue to support the government and to pay interest on the public debt," provides that writs or any other original process, by which any suit is commenced in any court of record, either in law or equity, shall have affixed thereto a stamp, the cost of which shall be fifty cents. The same act also provides that every instrument not so stamped shall be deemed invalid and of no effect. It is contended on the part of the respondent, that the notice of appeal is such process as the act of congress requires to be stamped, and that, as it is

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the initiatory step by which a suit is brought into a court of record, it is original process by which a suit is commenced in such court. The appellant contends that the notice is not process, certainly not original process, within the act of congress, inasmuch as it does not commence a suit in a court of record, but merely transfers an action, already commenced in a court not of record, to a higher court, being a court of record, for the purpose of reviewing the judgment of the court below, or of retrying the action in the court above after being tried in the court below.

To my mind the question is well put. If the suit had an existence before it was brought into the county court, can it with propriety be said to have been commenced then? As I read the statute, it is the process through which a suit is instituted originally, or commences its first existence in a court of record, and not that by which it is removed into or continued in such a court, after being commenced in a lower court, which is the subject of taxation. An original suit is almost always commenced in a court of record, by the issuing of some mandate or writ requiring those against whom the suit is instituted to appear therein; and process of that character is clearly within the provisions of the excise law, which is said to be violated in the case before us. But what is there in our system of appealing that is analogous to such process? Is it the notice that an appeal is taken, or the transcript of the proceedings in the court below which is required to be returned to the court above? The decisions of the commissioner of internal revenue, upon which the respondent relies as authority, seem to point to the transcript as such process. They certainly in some cases regard the transcript as the process by which the suit is brought into the higher court, evidently taking the view that it is the suit, and not the instrument by which it is commenced, that is the subject of taxation. If congress had intended to impose a tax directly on suits thereafter brought, that object

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could have been easily accomplished, and stamps would not have been required to effect it.

A slight examination of the act and of the schedules forming a part of it shows very clearly that the subjects of taxation are written instruments in general use, whose character and objects are well understood and which have a definite meaning. Such instruments are appropriate objects for stamp duties. Instead of taxing the indebtedness of one man to another, the evidence of that indebtedness, if reduced to writing, must be written on stamped paper, or have a stamp affixed to it. The transfer of a farm from one to another is not taxed, but the written conveyance, which is the evidence of that fact, must be stamped. So, instead of taxing suits which may be brought in courts of record, the instrument or process by which the suit is brought must be on stamped paper or have a stamp affixed.

I have therefore come to the conclusion that the notice of appeal is not such process as by the act of congress is required to be stamped. But as the case is new and important, it may be well to consider it in another aspect. If the act of congress requires such notice to be stamped, can it be amended, after review, by affixing a stamp? The respondent contends that the neglect to affix a stamp before review renders the notice and all subsequent proceedings absolutely void. The terms used to define the character of our stamped process are certainly strong, but I do not think that they necessarily import that such process is void. The lawmakers well understood the distinction between void things and things merely voidable. If they intended the want of a stamp should render all un-stamped instruments, subject to the tax, absolutely void, it was very easy to have said so. A legal proceeding may be invalid and ineffectual, without being totally void. It is true, that when an obligation for the payment of money requires a stamp, and it has been made and accepted with-

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out one, it cannot be made valid except by the act of the parties thereto. Being the act of the parties, no one else has any right or power to change it in any particular. But proceedings in courts are subject to the control of the courts, and are amendable in many cases by their orders. These orders are granted or refused, as the courts judge proper in the exercise of a sound legal discretion; that is, a discretion which is in conformity with legal enactments and well known precedents. And here the question arises: Can this notice of appeal, if a stamp should have been affixed thereto before it was served, be now amended by affixing one? In my judgment, such an amendment may be made. By section 173 of the Code it is provided that the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party, or by correcting a mistake in the name of a party, *or a mistake in any other respect*. Now, if this notice is a proceeding in an action in a court of record, it is clearly within this provision of the Code, and may be amended by affixing the proper stamp, if justice will thereby be furthered. By section 174 of the Code the courts are also authorized to supply an omission in any proceeding. Fuller authority for correcting mistakes and supplying omissions could not well be given; and it is difficult to conceive how the exercise of this authority by the courts can conflict with the revenue laws of the United States, when, by the very terms of the amendment which is allowed, the payment of the government duty is provided for. If a pecuniary penalty was incurred by not affixing the stamp in the first instance, the amendment does not prevent its enforcement, nor relieve the offender therefrom. It acts upon the process, and on that alone, and affects the party in default no further than it gives him standing in court on his complying with the order and paying the required duty.

But it may be said that allowing an amendment in this

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case, by permitting a stamp to be affixed to the notice, would be virtually extending the time to appeal, more than twenty days having elapsed since the recovery of the judgment before the justice. I am aware that it has been held that the courts have not the power to extend the time within which an appeal may be taken under the sections of the Code to which I have referred. This objection to the amendment rests upon the assumption that an un-stamped notice of appeal is absolutely void; a point that has already been discussed. The cases which hold that the time for appealing cannot be extended, admit that a defective notice of appeal may be amended. (*Fry agt. Bennett*, 16 *How. Pr. R.* 385.)

I find only two cases in which the effect of neglecting to affix a stamp to process has been considered, and neither of them reach the other question before us—whether a notice of appeal is such a process as requires a stamp. In the case of *Walton agt. Bryenth* (24 *How. Pr. R.* 357), an order had been obtained to vacate the proceedings on the ground that the summons had been filed without a revenue stamp. Judge BARNARD, of the supreme court, dismissed the order on the ground that congress had no right to interfere with the proceedings of the state courts. He held that congress might impose a penalty, but could not invalidate the proceedings of the state courts; and also, that the provision requiring a stamp was unconstitutional. This decision certainly takes broad ground, and in my judgment was uncalled for. I see no difficulty in sustaining the proceedings in the state courts without attacking the act of congress. It does not appear that in this case any proposition to amend was made or suggested.

In the *German Leiderkranz agt. Schiemann* (25 *How. Pr. R.* 388), which was in the superior court of New York, a motion was made to set aside the summons as void, it having been issued and served without a revenue stamp. It would seem, however, that a stamp had been affixed

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after review, but without any order allowing an amendment. Judge ~~WHITE~~, at special term, held, that the summons having been issued without a stamp was never duly or regularly issued, and that the subsequent affixing of a stamp to it would not cure the defect. He does not say the summons was void. Nor does it appear that an order permitting a stamp to be affixed was asked for. From what the judge says, the inference is that he would not have granted such an order. But an amendment may have been improper in that case, and yet allowable in this, if we adopt the theory that a stamp should have been affixed to the notice of appeal. A summons by which an action is commenced is clearly original process, and within the act of congress; and the neglect to affix a stamp may well be held inexcusable for that reason. Whether a notice of appeal is, is certainly not clear. That involves the question, whether such notice is a proceeding by which an action is commenced, and also the other question, whether the removal of an action, commenced in an inferior court, to a higher court for review, is the commencement of a new action.

The motion must be denied, but without costs; and the appellant may amend his notice of appeal by affixing a revenue stamp thereto, if he shall be advised so to do.

COURT OF APPEALS.

THE CHENANGO BRIDGE COMPANY, appellant agt. THE BINGHAMTON BRIDGE COMPANY, respondent.

The charter of "The Chenango Bridge Company," which is in perpetuity a toll-bridge, and without any reserved power to the legislature to alter or repeal it, contains this express provision: "That it shall not be lawful for any person or persons to erect any bridge or establish any ferry across the Chenango river within two miles either above or below the bridge erected by them."

Held, that this provision was intended to operate as a mere restriction upon individuals, public officers and authorities, and other corporations, and was not in-

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tended to be or to constitute *any restriction upon the sovereign authority of the state*, and does not involve any surrender of the rights on the part of the legislature to grant, in its discretion, such *other charters* within the limits prescribed, as it may deem required by the public interests.

Consequently, the grant, subsequently, by the legislature to "The Binghamton Bridge Company," to erect their bridge not less than eighty rods above the Chenango bridge, does not come within the *prohibition of the constitution of the United States*, which declares that "*no state shall pass any law impairing the obligation of contracts.*"

June Term, 1863.

THIS very important case was argued in this court, in 1862, before the following judges, who composed the court during that year, to wit: SAMUEL L. SELDEN, HIRAM DENIO, HENRY E. DAVIES, WILLIAM B. WRIGHT, JOSIAH SUTHERLAND, GEORGE GOULD, WILLIAM F. ALLEN and E. DARWIN SMITH. Upon bringing the case to a decision, the court were equally divided—Judge DENIO writing an opinion on one side, and Judge SMITH writing an opinion on the other side. Consequently a reargument was ordered. And the reargument was had this year (1863) before the following judges, who composed the court: HIRAM DENIO, HENRY E. DAVIES, WILLIAM B. WRIGHT, HENRY R. SELDEN, JAMES EMOTT, ENOCH H. ROSECRANS, RANSOM BALCOM and RICHARD P. MARVIN; when the judgment was affirmed, as it seems from the opinion of Judge WRIGHT, by a decision of five to three judges.

It is understood that Judge DENIO stated, when the case was first argued in 1862, that it was the most important case that had come before the court that year. It is also understood that the case is to be taken to the supreme court of the United States. In publishing the opinion of the court, by Judge WRIGHT, we precede it by the very able opinion of Judge SMITH, written last year, on the same side; and would be glad to publish the opinion of Judge DENIO, if we knew how to procure it.

The facts will sufficiently appear in the following opinion.

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E. DARWIN SMITH, J. It is perhaps to be regretted that legislative grants of franchises, immunities and special privileges have ever been held or adjudged to be *contracts* within the intent of section 10 of the first article of the constitution of the United States. Such rights might safely have reposed for their protection upon the justice and sense of equity of the legislative bodies of this country, with a far more wise and true regard to public and private interests than is involved in the surrender of the sovereign right of the people to legislate freely and unrestrainedly upon all subjects whatever within the limits of the legislative power and discretion.

But the doctrine is too well settled to be now discussed or questioned. "All the cases," said Judge BLACK, in the case of the *Bank of Pennsylvania* agt. *The Commonwealth* (7 *Harris*, 141), "are saturated with this doctrine. It is sustained, not by a current, but by a torrent of authorities. No judge, who has a decent respect for the principle of *state decisions*—that great principle which is the sheet-anchor of our jurisprudence—can deny that it is immovably established." (*And vide Dartmouth College* agt. *Woodworth*, 4 *Wheaton*, 418; *and Fletcher* agt. *Seck*, 6 *Cranch*, 87.)

The plaintiffs have a charter from the legislature, authorizing them to construct and maintain in perpetuity a toll-bridge across the Chenango river at or near Chenango Point. This charter is a legislative contract, and within the protection of the constitution of the United States; and the question for our decision is, whether the charter granted to the defendants, also to construct and maintain a bridge across the said river, impairs the obligation of such contract. If it does, it is necessarily unconstitutional and void.

I. The first question, therefore, for our decision is: What is the true construction of the plaintiffs' charter? The plaintiffs claim that by the terms of such charter they have the exclusive right to erect and maintain a bridge

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over the Chenango river at or near Chenango Point (now Binghamton), with a restriction against the erection of any other bridge "within two miles either above or below the bridge so erected."

The charter of the plaintiffs is contained in an act of the legislature, passed April 6, 1805. The act is entitled "An act to establish a turnpike corporation for improving and making a road from the village of Oxford, in the county of Chenango, to intersect the Newburgh and Cochecton turnpike road, and for other purposes." After providing for the organization of the Newburgh and Chenango turnpike company, and directing the manner of constructing the contemplated turnpike road and intersecting road, in twenty-two sections, it contains a recital, as in the beginning of a new act, as follows: "Whereas, the foregoing incorporation cannot be sufficiently carried into effect, or the public convenience fully promoted, if durable and permanent bridges across the Susquehannah and Chenango rivers, and the east and west branches of the Delaware river at the several places of intersection of the said roads, are not at the same time erected and maintained; and whereas, it is suggested that it will be expedient, for the purpose aforesaid, to make two separate and distinct bridge incorporations, with powers adequate to the accomplishment thereof in the best and most suitable manner: therefore (*section 23*) be it enacted that Richard B. Clark and all others as should associate for the purpose of constructing a bridge over and across the east and west branches of the Delaware river, &c., be a body corporate and politic, by the name of the President and Directors of the Delaware Bridge Company," &c. The act then, in the fourteen following sections, provided for the organization and management of such corporation, and defined its powers and rights, and declared its duties and obligations, &c. Section 31 declares "that it shall not be lawful for any person or persons to erect any bridge or bridges, or estab-

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blish any ferry, across the said east or west branches of the Delaware river within two miles either above or below the bridge to be erected and maintained in pursuance of this act." Section 38 then, "for the purpose of erecting and maintaining a good and sufficient toll-bridge on and across the Chenango river at or near Chenango Point," provides for the organization of a corporation by the name of the "Susquehannah Bridge Company," which should have perpetual succession, and be and were thereby invested with "all and singular the powers, rights, privileges, immunities and advantages, and be subject to all the duties, regulations, restraints and penalties which are contained in the foregoing incorporation of the Delaware Bridge Company." And the section further declares, that "all and singular the provisions, sections and clauses thereof, not inconsistent with the particular provisions herein contained, shall be and hereby are fully extended to the president and directors of this corporation."

The true construction, as I conceive, of these sections is, that these two corporations shall possess the same identical *rights, powers and privileges*—the Delaware company to construct *two* bridges over the Delaware river, and the Susquehannah company *one* over the Chenango and *one* over the Susquehannah. This single fact constitutes the only distinction or inconsistency between them, except their names. Such I think the clear and manifest intention of the legislature.

I cannot agree to the construction put upon this section by the learned judge who tried the cause at the special term, or the judges at general term, that the above mentioned 31st section is not part of the charter of the Susquehannah company as much as of the Delaware company. I cannot agree that the restriction of the said 31st section rests for its extension to or inclusion in the charter of the Susquehannah Bridge Company upon mere *implication*.

The doctrine is undoubtedly sound, asserted in *State-*

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bridge Canal agt. *Wheeley* (2 *Barn. & Adol.* 792), that "in contracts with the public, nothing is derived from the public by *implication*." In *Charles River Bridge Co.* agt. *Warren Bridge*, Chief Justice *TANEY* asserts the said rule; and it is asserted in numerous other cases. (16 *How. U. S.* 427; 13 *id.* 7; 21 *Penn.* 22.)

But this 31st section is part of the charter of the Susquehannah company, by the positive and express terms of the statute. The charter of this company is contained in and consists of the sections of the act aforesaid, including the preamble prefixed to the 23d section, from and inclusive of said 23d section to and inclusive of the 38th section. The sections apply alike, except the 38th, to both incorporations. The 31st section no more applies to the Delaware company than it does to the Susquehannah company. The legislature has expressly said, that "all of said sections and clauses and provisions thereof shall be and are fully extended to the latter company;" and I cannot see upon what principle it can be contended that this 31st section is not part and parcel of the plaintiffs' charter. It is *in it* and a *part of it*, and must have full effect.

The fact that, as it reads, it nominally applies to the Delaware river and Delaware Company, and the bridges to be erected by said company, is the only inconsistency which renders this section inapplicable to the Susquehannah company. The inconsistency is obviated by the express provision of the 38th section, creating the Susquehannah company by a different name, to construct two bridges, one over the *Chenango* river, and one over the Susquehannah. Each company was to construct *two* bridges. There is no implication in the case. The statute is *express* and *explicit*. It gives to each company the same identical right by the *same section*.

In the charter of the Susquehannah company the section means and should be read precisely as if the word *Susque-*

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hannah were substituted for Delaware, leaving out the *name, and the words, said east and west branches.*

This construction the express words of the statute demand ; and it is not, I conceive, possible to give full force and effect to its language upon any other interpretation.

The fact that the Susquehannah company was to construct one of its bridges at or near Chenango Point does not, I think, affect the question. The bridge was not located in the act. If, on its location, the two miles could not apply to the Chenango river, it would doubtless apply to the extent which the river ran below the bridge, and to the distance of two miles above. This restriction must certainly apply to the bridge to be constructed by said company over the Susquehannah at Ouquago, and was therefore a proper provision, and having full force in favor of the Susquehannah company ; and if it does not apply to the full extent of two miles, for any reason, to the bridge at Chenango Point, the greater would include the less, and it would apply as far as practicable within the limits specified.

The act of 1808, I do not think, affects this question. The Susquehannah company was then organized, and was by this act continued, with all its rights, by the name and style of " The Chenango Bridge Company " and as such it was to have perpetual succession (in lieu of life for thirty years) " under all the provisions, regulations, restrictions and clauses of the Susquehannah Bridge Company."

II. Assuming, then, that the chartered rights of the plaintiffs are those conferred and defined in the said act of 1805, as modified by the act of 1808, and that section 31st of the act of 1805 applies in full force to plaintiffs' company, and is part of their charter, the inquiry remains: What is the true force and effect of the provisions in said section ?

The plaintiffs' charter, therefore, must be construed and considered as containing the express provision "*that it shall not be lawful* for any person or persons to erect any

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bridge or establish any ferry across the Chenango river within two miles either above or below the bridge erected by them."

The provision, I conceive, was intended to operate as a mere restriction upon *individuals, public officers and authorities, and other corporations*, and was not intended to be or to constitute any restriction upon the sovereign *authority of the state*, and does not involve any surrender of the rights on the part of the legislature to grant, in its discretion, such other charters as it may deem required by the public interests.

The Chenango river is a fresh water stream, in which the tide does not ebb and flow, and is therefore a private river. The riparian proprietors own the bed and banks. As early as 1798 it was declared a public highway, but subject to the public easement for the purpose of navigation. The riparian owners might make such use of it as they pleased; might bridge and dam it, except as prohibited by acts of the legislature, and might cross it with ferries, except as so forbidden.

In 1797 an act was passed providing for the opening and constructing of highways and bridges, by superintendents and commissioners of highways; and in the same year provision was made to authorize and regulate ferries within the state—forbidding the establishing and use of any ferry, for profit and hire, unless duly authorized, and conferring authority upon the courts of common pleas in each county of the state to grant licenses for keeping ferries, as many and to such persons as the court shall think proper.

The provision of section 31st, in the plaintiffs' charter, declaring that it should not be lawful for any person or persons to erect any bridge or establish any ferry within two miles of the bridge, &c., doubtless applied to all the superintendents and commissioners of highways, and to the courts of common pleas, and to all private persons. The legislature clearly considered that it had a right to impose

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such restriction upon public officers and private persons, and clearly intended so to do; for the said section 31st contains a proviso as follows: "Provided, nevertheless, that nothing herein contained shall be construed to prevent any person residing within two miles of the said bridges from crossing the said river to or from his or her house or land, with his or her own boat or craft, without being subject to the payment of any toll."

It will thus be seen that there were sufficient persons and officers and public authorities for the provision in the said section to apply to, so that it might have *full effect* without extending its operation to the state or the legislative authority. Without this provision, the superintendent of highways for the county, and the commissioners of highways of the town and towns contiguous to the Chenango river, might have laid out highways and constructed bridges across said river at such places as they deemed proper; and the court of common pleas might have allowed ferries to be established across the same, so as entirely to destroy the plaintiffs' franchise.

It is not necessary, therefore, to give full force and effect to the language of this section 31, to hold that it is or was intended to be a restraint upon the legislative power.

In grants by the public to corporations, nothing, we have seen, passes by *implication*. (8 Peters, 289 and *n.*; *id.* 548.)

Most especially should this rule be applied to grants which are claimed to deprive the legislative authority of its powers to promote the best interests of the public by appropriate and needful legislation. Judge TANEY, in the *Charles River Bridge case* agt. *Warren*, says: "A state ought never to be presumed to surrender their power, because the whole community have an interest in preserving it undiminished. And where a corporation alleges that a state has surrendered its powers of improvement and public accommodation, the community have a right

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to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the state to abandon it does not appear."

Judge BLACK, also, in the case of the *Pennsylvania Railroad Co.* agt. *Canal Commissioners* (9 *Harris*, 21 *Penn. H.* 22), states this rule with great explicitness. He says: "When a state means to clothe a corporation with a portion of its own sovereignty, and to disarm herself to that extent of the power which belongs to her, it is so easy *to say so*, that we will never believe it to be *meant* where it is *not said*." (See also *Richmond R. R. Co.* agt. *Louisa R. R. Co.* 13 *Peters*, 81.) In this state the same rule was asserted by Chancellor WALWORTH in *The Mohawk Bridge Co.* agt. *The Utica R. R. Co.* (5th *Paige*, 654.) In that case it appears that the Mohawk company claimed an exclusive right to carry passengers across the Mohawk river at Schenectady, and that that right extended one mile above and one mile below their bridge, and restricted also the right to erect ferries. The precise language of the act under which such claims were made, aside from the charter authorizing them to erect and maintain a toll bridge across said river, and receive and demand toll, etc., was as follows: "that after said bridge shall be built and completed *it shall not be lawful* for any person or persons to erect or to keep any ferry or bridge over the said river, at any place above said bridge, within one mile from said bridge, or below the said," etc. (Sess. *Laws* of 1805, 586, 7.)

The chancellor says of this charter: "The legislature has indeed protected the Mohawk Bridge Company in the enjoyment of an exclusive right to carry passengers across the river at Schenectady, to a certain extent, by prohibiting others from establishing a ferry within a certain distance from the toll bridge; *but it has not deprived a future legislature* of the right to authorize the erection of another bridge within the prescribed limits whenever the public good shall appear to require it."

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In 1st *Barb. Ch. R.* 548, in case of the *Oswego Falls Bridge Co.* agt. *Fisher*, the chancellor again asserted the same doctrine, referring to the case of the *Mohawk Bridge Company*, and says he came to the conclusion in that case that the grant to a corporation to erect a toll bridge across a river, *without a restriction of the power of the legislature* to grant a similar privilege to others, would not deprive a future legislature of such power. The charter of the *Oswego Bridge Company* contained no express words of restriction, and these two therefore are not in point upon these facts, but are cited as an opinion of the learned chancellor on the point in controversy. The case of *Thompson agt. The N. Y. & Harlem R. R. Co.* (3 *Sand. Ch.* 628) is quite like this. The language of the act incorporating the defendants was the same as used in the thirty-first section of plaintiffs' charter.

It is as follows: "That it shall not be lawful for any person or persons whatsoever to erect, or cause to be erected, any other bridge on or across said *Harlem river*."

It was held by the learned vice-chancellor that this language did not restrict the authority of a subsequent legislature to establish or allow a toll bridge or ferry at the same place.

In *The Tuchaber Canal Co. agt. The Tuchaber & James River R. R. Co.* (11 *Leigh*, 42,) it was held by the court of appeals of Virginia, that to give a monopoly to a corporation, there must be an *express provision* in the charter *whereby the legislature restrains itself from granting charters for rival and competing works*.

Such is the head note of the case.

The plaintiff had a charter for the construction of a canal, and the legislature granted a subsequent charter to a railroad corporation to construct its road across the plaintiff's canal and along the same route. It was claimed that this was an infringement of the plaintiff's exclusive rights. The case was very elaborately discussed and carefully considered, and was decided upon the same ground, and upon

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the authority in part of the case of the *Charles River Bridge* agt. *Warren*.

It is not in its facts precisely in point, but is in the doctrine and principles it asserts. The learned judge, who gave the opinion of the court, says: "Monopoly is not a matter of inference; it must rest its pretensions upon *express grant*; it is a restriction upon common rights, and upon the legislative power, and cannot be *implied*;" also, speaking of charter for canal and railroad, he says further, that by charters of this description the legislature is not deprived of the power of granting charters to other companies, even side by side with the former, and in the same line of travel, provided there is no *express restriction upon* their power in the first act of incorporation.

The case of the *Boston & Lowell R. R. Co.* agt. *The Salem & Lowell R. R. Co. and others* (2 *Gray*, 1) is, I think, in principle, to the same effect.

This was a bill in equity to protect the rights of the plaintiff for the construction of a second railroad in competition with their railroad, and for an injunction.

The plaintiff's road was constructed under a charter for an incorporation to construct a railroad from Boston to Lowell, granted by the legislature in 1830. The legislature subsequently granted charters for other railroads, which, by consolidation and agreements, had in effect constructed a road competing with the plaintiff's road. In the plaintiff's charter, section twelve, is the following provision: "Be it further enacted, that no other railroad than the one hereby granted, shall, within thirty years from and after the passing of this act, be authorized to be made, leading from Boston, Charlestown, or Cambridge, to Lowell, or from Boston, Charlestown or Cambridge to any place within five miles of the northern termination of the railroad hereby authorized to be made;" provided the state may authorize any company to enter with another railroad at any point of said Boston and Lowell railroad, paying for the right to

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use the same or any part thereof, such a rate of toll as the legislature may from time to time prescribe, etc.

This is clearly an *express restriction* upon the legislative power to grant charters for other railroads to compete with the Boston and Lowell company, within the prescribed term of thirty years, except upon the term specified in the said act of incorporation. It was clearly a legislative contract to that effect within all the cases.

Judge SHAW, in giving the opinion of the court, speaking of the provision in the abovementioned twelfth section of the plaintiff's charter, says: "It was certainly a stipulation on the part of the government, regulating its own conduct, and putting a restraint upon its own power to authorize any other railroad to be built with the right to levy a toll; but without any authority from the government no other company or persons could be authorized so to make a railroad and levy toll, and, of course, no other such road could lawfully be made. It was therefore equivalent to a covenant of quiet enjoyment against its own acts, and those of persons claiming under it." This is, in fact, all the government could stipulate.

The learned judge says further, that they "were of the opinion that under the form of the words used, 'that no other railroad should be authorized for thirty years,' the government, so far as it has the power to do, intended to engage with the corporation that no other direct railroad between Boston and Lowell should be legally made."

The decision of this case was thus put upon the *express language* of the charter: "that no other railroad should be *authorized* to be made," etc., etc.

The rule asserted in these cases, that nothing in the shape of monopoly or special privilege shall be taken from the government, except by *express grant*, is eminently sound.

The history of the legislation of this state and country, for the last fifty years, illustrates its importance and vindicates its wisdom.

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So numerous and various are the schemes and devices of the spirit of monopoly among our people, and so artful, insidious and successful the contrivances of speculators and jobbers to secure special grants and privileges from legislative bodies, that the public interests imperatively demand of the courts the firm and faithful assertion of the rule that nothing shall be taken from the sovereign authority by *implication*; that whoever claims that the legislature has relinquished its power to legislate for the public good upon any subject, should show a legislative grant for each surrender of power, in *clear, express and explicit language*; so *clear and unequivocal* that no one, however poorly informed, who may chance to reach the legislative hall, can mistake its meaning or assent to its passage upon any ground of error, mistake or misconception.

Such should be, and such I think is, the rule for the construction of legislative grants; and no court, as I can conceive, in this country, will discharge its duty to the public which asserts or assents to any other. The plaintiffs' charter contains no such stipulation on the part of the legislature of the state, relinquishing its power to grant other charters for bridges over the Chenango river as the public interests may require.

The act granting the defendants authority to construct a bridge over said river was, therefore, entirely within the lawful power and discretion of the legislature. It follows that the plaintiffs' complaint was properly dismissed, and that the judgment of the court below, affirming such judgment, should be affirmed with costs.

HENRY R. MYGATT, *for appellant.*

DANIEL S. DICKINSON, *for respondent.*

WRIGHT, J. The constitution of the United States declares that "no state shall pass any law impairing the obligation of contracts." (*U. S. Con. art. 1, § 10.*) The provision interpreted by the light of history has been sup-

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posed by many only to have been intended to apply to executory contracts; but a more extended interpretation has been given to it by that court which possesses the ultimate right of passing upon the question, and whose decisions we are bound to respect and follow as the law of the land. Not only has it been settled that an executory contract, but also that a grant or executed contract, comes within the scope of the provision, and that a legislative grant of a franchise to a corporation to maintain a bridge or ferry, or turnpike route, is a contract, if the grant be accepted, within the meaning of the section, which no subsequent legislature can interfere with, even to promote the public good, if by such interference the private interests of the corporation are affected. (*Fletcher agt. Peck*; 6 *Cranch*, 87; *Dartmouth College agt. Woodward*, 4 *Wheat.* 518; *Green agt. Biddle*, 8 *Wheat.* 2; *Gordon agt. The Appeal Tax Court*, 3 *How.* 133; *State Bank of Ohio agt. Knapp*, 18 *How.* 369.) It may be doubted whether it was wise and legally sound to attribute to a legislative act granting to a corporation an exclusive right to maintain a bridge or ferry and exact compensation from the public for crossing a stream at a given point, the force of a contract within the constitutional provision; but such is clearly the doctrine and effect of the series of adjudications referred to. It is no longer to be questioned, that a private company to whom a state legislature has in express terms granted the exclusive right of maintaining a bridge and exacting tolls for crossing a stream at a designated locality, when the franchise has been accepted and acted under by the corporation, and no power is reserved to alter or repeal the law, is protected, even though the public interests may suffer, by the constitutional prohibition, against any subsequent legislation which is or permits a direct interference with the enjoyment of the franchise or diminishes its value. Any law of that character, it is held, impairs the obligation of the contract between the state and the corporators, and is within the

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purview and prohibition of the federal constitution. The right, however, alleged to have been impaired or invaded, must have been given or granted expressly, and will not be implied. Public grants are to be construed strictly, and neither individuals or corporators will be deemed to have acquired rights as against the state by implication. In the grant of privileges to a corporation nothing passes but what is granted in clear and explicit terms, and by words too plain to be mistaken. When a state, says Judge BLACK, in the case of *The Pennsylvania R. R. Co.* agt. *The Canal Commissioners* (21 *Penn. R.* 22), means to clothe a corporate body with a portion of her own sovereignty, and to disarm herself to that extent of the power that belongs to her, it is so easy to say so that we never will believe it to be meant when it is not said. In the construction of a charter, to be in doubt is to be resolved, and every resolution which springs from doubt is against the corporation. If the usefulness of the company would be increased by extending them (privileges), let the legislature see to it; but remember that nothing but plain English words will do it. The wisdom of such a rule of construction will not be questioned by any one who has at heart the safety and preservation of his state government. (*Richmond R. R. Co.* agt. *Louisa R. R. Co.* 13 *How.* 71.)

The plaintiffs were incorporated in 1808 by a single section of an act purporting to amend "The Neversink Turnpike Road and Susquehannah Bridge Companies," incorporated by a previous act in 1805. This last named act created five corporations, amongst which were two bridge companies, viz: The Delaware Bridge Company and The Susquehannah Bridge Company. The first to erect and maintain bridges across the east and west branches of the Delaware river, and the other to erect and maintain a bridge across the Susquehannah river at Onquago, and another across the Chenango river at or near Chenango Point. The section referred to as incorporating

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the plaintiffs was without detail, except as to the amount of capital, simply providing that "for the purpose of erecting and maintaining a toll bridge across the Chenango river at or near Chenango Point, the present stockholders of the Susquehannah Bridge Company, or such others as should associate for that purpose before the first day of January next, shall be and hereby are created a body corporate in fact and in name, by the name of 'The Chenango Bridge Company,' and as such to have perpetual succession under all the provisions, regulations, restrictions, claims and provisions of the beforementioned Susquehannah Bridge Company; and their capital in stock shall consist of ten thousand dollars." (*Laws of 1808, ch. 119.*) It will be observed, therefore, that there was no legislative grant in terms of the rights and privileges to be possessed and enjoyed by the corporation; but the intent is plain that they were to be the same as those granted to the Susquehannah Bridge Company, not only in its original charter, which provided for the erection and maintenance of both bridges, but also by the amendment of such charter in the incorporating the plaintiffs.

In pursuance of this act the plaintiffs' corporation was organized and proceeded to erect a bridge across the Chenango river at the point designated, and about eighty rods from the southerly termination of such river. For more than half a century they have maintained the bridge, and have reaped therefrom, for the last thirty years, in the way of dividends on the capital stock, nearly seventeen per cent. per annum. In the meantime Chenango Point, now called Binghamton, the locality of the bridge, has from an inconsiderable settlement become a large and prosperous village, located on the east and west side of the Chenango river, and having in 1857 nearly ten thousand inhabitants. Up to 1855 there was no way for that portion of the population residing on the west side of the Chenango to cross it except by the plaintiffs' bridge. In

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1855, to promote the public convenience, the legislature incorporated the defendants "with power to construct another bridge at a point not less than eighty rods above the plaintiffs' bridge." (*Laws of 1855, ch. 164.*) The construction and use of the defendants' bridge has to some extent diminished the profits of the plaintiffs' franchise; and it is therefore claimed by the latter that the law incorporating the defendants, and empowering them to erect and maintain their bridge, is unconstitutional and void.

It is not pretended, of course, that the plaintiffs' right to maintain their bridge, and exact tolls from the public for crossing it, has been interfered with; but the ground taken is that their grant gives them a monopoly of the waters of the Chenango for the distance of two miles above and below their bridge; that their charter contains in effect a stipulation on the part of the state, when perpetually surrendering into their hands a portion of its sovereignty, not to sanction competition, or to maintain or authorize to be maintained any other similar improvement within two miles each way from their bridge, that might diminish the amount of their income. Undoubtedly, if the charter of the plaintiffs gave them an exclusive privilege over the waters of the Chenango river, to the extent of four miles up and down the stream, for bridge or ferry purposes, and the legislature in the contract with them deliberately and intentionally surrendered for all time the power of the state to make improvements for the public accommodation within those limits, any subsequent law establishing or authorizing the establishment of another bridge or ferry would be within the constitutional prohibition. On the contrary, if such exclusive privilege is not given in clear and explicit terms, and a reasonable construction of their charter, or of the act incorporating them, renders its own doubtful whether the state meant or intended to disarm herself to the extent claimed, of her sovereign authority, the exercise of such authority in

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1855, when the public necessity required it, would be unobjectionable and valid, even though its tendency might be to lessen the value of the plaintiffs' franchise. It is, therefore, a principal question in the case, whether the privilege asserted by the plaintiffs be or be not secured to them by the acts of 1805 and 1808.

The plaintiffs, as has been mentioned, were endowed with the corporate rights or functions of the Susquehannah Bridge Company. This latter corporation had been originally created for the purpose of erecting and maintaining a bridge across the Susquehannah river, on the line of one of the branches of the Neversink Turnpike Company, and also a bridge across the Chenango river at the starting point of such branch road. The act of 1808 limited its functions to the erection and maintenance of the first named bridge, and created the plaintiffs an independent corporate body to erect and maintain a bridge across the Chenango at or near Chenango Point. For the terms of the plaintiffs' charter we are to look to that of the Susquehannah Bridge Company; and looking into the act of 1805 it is seen that the rights and privileges of the latter company are not defined; but it is provided in a single section that it is to have perpetual succession, and be "invested with all and singular the powers, rights, privileges, immunities and advantages, and be subject to all the duties, regulations, restraints and penalties which are contained in the foregoing incorporation of the Delaware Bridge Company;" and all and singular the provisions, sections and clauses thereof, not inconsistent with the particular provisions contained in the section incorporating the Susquehannah Bridge Company, were fully extended to such corporation. For the terms, therefore, of the charter of the Susquehannah Bridge Company, resort must be had to the prior sections of the act of 1805, incorporating the Delaware Bridge Company. Of course the intention by the general language was not to import into the Susquehannah Bridge

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Company's charter the provisions *in hac verba* of the sections of the act creating the Delaware Bridge Company; but I think the intention is plain to invest the former company with all the powers, rights and privileges pertaining to a bridge corporation, as such, and similar to those which had just been given and accorded to the latter, subjecting it to like duties, regulations and restraints. All the provisions of the act in respect to the Delaware Bridge Company which related to its corporate powers; the manner of organization; the kind of bridge to be erected, and when to be completed; the right to erect gates at either end of the bridges, and demand and receive tolls; the neglect to repair or rebuild, which was to work a forfeiture of the charter; the duties enjoined in respect to the care and superintendence of the bridges, and the penalties imposed and to be enforced, were made applicable to the Susquehanna Bridge Company, and the section incorporating it should read as though similar provisions were literally embodied in it. But it is insisted that if this were all, there could be no pretext that the alleged bargain between the state and the plaintiffs embraced any engagement from the state, that competing bridges or ferries should not be erected or allowed for the distance of two miles above and below their bridge. Hence it is sought to further import into the charter of the Susquehanna Bridge Company a provision of the act, limited in words, to the bridges to be erected by the Delaware Bridge Company across the east and west branches of the Delaware river. The thirty-first section of the act provides "that it shall not be lawful for any person or persons to erect any bridge or establish any ferry across the said west and east branches of the Delaware river, within two miles above or below the bridge, to be erected and maintained in pursuance of this act," etc. It is assumed that this provision, although not in express terms, was tantamount to an engagement on the part of the state, which entered into and formed a part of the contract

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with the Delaware Bridge Company, that no competing bridge or ferry should be erected or allowed during the continuance of the corporation, for two miles above and below the bridges; that the exclusive privilege thus given was carried by force of the general words employed into the Susquehannah Bridge Company's charter; and as the plaintiffs were endowed with the rights, privileges and capacities of the latter company, not the identical monopoly, but a *similar one*, this privilege over the waters of the Chenango river was secured to them.

I think this position not tenable, for reasons that will be stated:

1. The privilege, whatever may be its character, is not given in terms to the Chenango Bridge Company; nor does the provision relate to a monopoly of the waters of the Chenango river, but on the contrary the words of the act limit the prohibition to the west and east branches of the Delaware river. But it is claimed that the legislative intent is manifest, that the plaintiffs were to possess and enjoy the "rights, privileges and advantages" of the Delaware Bridge Company, and as one of those "advantages" consisted in a monopoly of the streams on which their bridges were to be erected, for two miles each way from the bridges, a like monopoly of the Chenango river was intended to be given to them. The acts of 1805 and 1808, however, afford no satisfactory evidence that the legislature intended to grant such a monopoly to the plaintiff. The leading purpose of the act of 1805 was to establish a corporation for making a road from Oxford, in the county of Chenango, to intersect the Newburgh and Cochection turnpike at a point easterly of the east branch of the Delaware river, and as subsidiary thereto another corporation to open a communication by a turnpike road from Chenango Point to Kingston. The bridge incorporations were but secondary, and, as was afterwards expressed, were created to sufficiently carry into effect the road incorporation. The

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Chenango road was to cross the west and east branches of the Delaware river, and the west branch of the Kingston or Neversink road, starting from Chenango Point, the Susquehannah river, and, it might be, the Chenango river. The act first provided for the incorporation of the Newburgh and Chenango Turnpike Company, reserving the power to dissolve the corporation and vest its property in the state, when the income arising from the tolls had paid for making the road, together with an interest on the money expended of ten per cent. per annum. The Neversink Turnpike Road Company was next created, with the same provision as to a dissolution of the corporation and vesting its property in the people of the state. The act then sets forth, in the form of a preamble, the necessity, with the view of sufficiently carrying into effect the foregoing road incorporations, and fully promoting the public convenience, of erecting and maintaining durable and permanent bridges across the Susquehannah and Chenango rivers, and the east and west branches of the Delaware river, at the several places of intersection of the said roads; that from the size and rapidity of the streams, great expense would be necessarily incurred in erecting and maintaining such bridges, and, from the extraordinary freshets and frequent obstructions happening in those rivers, which would endanger the permanency and durability of the bridges, a frequent renewal of the whole capital might be required for rebuilding them, and therefore require a power (not contained in the foregoing corporation) for calling from the stockholders, from time to time, such sums as should be required for upholding such bridges; that these circumstances forbade the policy incorporated in the foregoing road incorporations, that said property should revert to the state; and that it would be most expedient, for the purposes aforesaid, to make two separate and distinct bridge incorporations with powers adequate to the accomplishment thereof in the best possible manner. The act then proceeds to create a cor-

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poration by the name of "The President and Directors of the Delaware Bridge Company," for the purpose, as expressed, of erecting bridges across the east and west branches of the Delaware river, where the turnpike road to be laid out by virtue of the act should cross the same. Provisions for subscription to stock and for properly organizing the company, describing the kind of bridges to be built, and when to be completed; the power to demand and receive certain rates of toll at each of the bridges, and other regulations and restraints followed.

Amongst the provisions was one before stated, declaring "it unlawful for any person or persons to erect any bridge or establish any ferry across the said west and east branches of the Delaware river within two miles above and below the bridges to be erected and maintained in pursuance of the act." The corporation was to have continual succession for the full term of thirty years from the passage of the act, and at the expiration of such time the bridges, with their appurtenances, were to become the property of the state.

The next provision in order was the incorporation of the "Susquehannah Bridge Company," for the purpose of erecting and maintaining a toll-bridge over and across the Susquehannah river at or near Ouquago, in the county of Tioga (a point of intersection of the turnpike roads), and also for the erecting and maintaining a toll-bridge on the Chenango river at or near Chenango Point (the starting point of the Neversink road). All such persons as should associate for that purpose, and their successors and assigns, were created a body corporate by the name of the Susquehannah Bridge Company, to have perpetual succession, and be invested with the powers, rights, privileges, immunities and advantages, and be subject to all the duties, regulations, restraints and penalties which were contained in the foregoing incorporation of the Delaware Bridge Company; and all the provisions, sections and clauses thereof,

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not inconsistent with the particular premises contained in the section creating the Susquehannah Bridge Company, were fully extended to the latter incorporation. As it was thus provided that this corporation was to have perpetual succession, it could hardly be inferred that it was the original intention that the provision limiting the existence of the Delaware Bridge Company to thirty years, and a reversion of its property to the state, should apply to it; but the act of 1808 settles any doubt that might have been entertained as to the effect of the general words of the section, by a repeal of the thirty years' limitation, and making the existence of the Susquehannah Bridge Company perpetual, whilst it divided it into two companies.

The policy indicated, therefore, by the legislative action was not the same in respect to the two, and ultimately the three bridge incorporations. The duration of one of them (the Delaware Bridge Company) was limited to *thirty years*, when its bridges were to revert to the state; and it might well have happened that those across the east and west branches of the Delaware river would become state property and free bridges before the turnpike road, of which they were a part, would revert. The others were to exist forever as private corporations, notwithstanding the turnpike road on which they were situated might become public property. It was evidently the purpose of the legislature to offer similar inducements to adventurers, and to place the second road and bridge companies on an equal footing. There is nothing to indicate that in the view of the legislature one of the contemplated bridge enterprises was of more importance than the other, or that it was necessary to hold out greater inducements in the one case than in the other. Certainly, a perpetual bridge franchise in that part of the state was to be regarded as more valuable without an engagement from the state not to sanction competition, than one to continue only for thirty years with such engagement written in it; and it ought not to be assumed,

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without the strongest evidence, that a legislative act, which cautiously refrained as to one bridge incorporation to bargain away the power of the state for all time to make improvements in a particular section for the public accommodation, intentionally bargained any such power to another corporation in no sense more meritorious.

Can it be said, then, that it was intended to confer larger privileges and advantages on one of the corporations than on the other ? I think not. It may have been meant that the Delaware Bridge Company, which was to endure for thirty years, should enjoy a monopoly of the waters of the two branches of the Delaware river ; but it is not a reasonable inference that such a right was designed to be conferred on a corporation created for similar purposes, and in the same legislative scheme *to which perpetual existence was given.*

A provision forbidding competition by individuals was doubtless of importance at that early period, and it is at all times, to either bridge or ferry proprietors ; but it was of especial importance to a corporation that could only look thirty years ahead for a reimbursement of its outlays or for a realization of profits from its franchise. There would be no equality in advantages proffered to bridge companies of equal merit, in a scheme which designedly gave a like monopoly to one whose existence was made perpetual. No satisfactory reason can be assigned for the distinction as to the durability of the charter, unless it be that the legislature only contemplated conferring on the companies, to whom perpetual existence was given, the right to erect and maintain toll-bridges at the points named, without any monopoly of the streams.

Again : The provisions in the Delaware Bridge Company incorporation, declaring it to be unlawful for any one to set up competing bridges or ferries, cannot, by any just interpretation of the act or of legislative intention, be carried into the Susquehannah Bridge Company charter.

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Nothing is to be deemed carried into it by the general words used, than is consistent with the particular provisions of the section creating the last named corporation. A purpose of its creation was to construct a bridge across the Chenango river at or near Chenango Point. It was as well known then as now, both by the legislature and by the applicants for the charter, that the designated locality of this bridge was at the confluence of two rivers, and at a point where the Chenango terminated by emptying itself into the Susquehannah. It would have been an absurd provision to introduce into their charter, that no one should establish a competing bridge or ferry on the Chenango river for the distance of two miles below their bridge. It was a physical impossibility to give the same monopoly of the waters of the Chenango as was given, as is alleged, to the Delaware Bridge Company on the waters of the Delaware river. It is not to be assumed that the legislature or the parties interested in the application contemplated any such absurdity.

I consider that the section of the act of 1805, making it illegal for any person or persons to erect any bridge or establish any ferry across the west and east branches of the Delaware river, within two miles above or below the bridges to be erected and maintained in pursuance of the act, was in substance a stipulation on the part of the state to the extent expressed, entering into the contracts with both bridge companies, that competition should be prevented. I cannot well see how it can be construed as a restriction upon the sovereign authority. In terms it is a restriction, if at all, upon persons, and as such was offered and accepted by the bridge companies. There was no guarantee written in the contract, that if the public exigencies or interest required, the state would not exercise its sovereign power in the premises. Such a stipulation in a contract with the *adventurers*, it is urged, would have been worthless and illusory. Not at all; but on the con-

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trary, it would have been indiscreet, not to say profligate, legislation, to have bargained away forever state authority over the subject. As a restriction upon individuals, public officers and local authorities, it was of great importance to the adventurers. The riparian proprietors of the streams might have bridged them or crossed with ferries, except as forbidden by acts of the legislature. There were then statutes providing for the opening and construction of highways and bridges by superintendents and commissioners of highways, and also for authorizing and regulating ferries within the state. The establishment and use of a ferry for profit was forbidden, unless duly authorized; and authority was conferred upon the court of common pleas in each county of the state, to grant licenses for keeping ferries to such persons as the courts should think proper. It was certainly of consequence to the corporators that they should be protected against the otherwise lawful acts of these superintendents and commissioners of highways, courts of common pleas and private persons.

But it is said, that if it was not a restriction upon the sovereign power, the legislature might have rendered the franchises comparatively valueless, immediately upon the completion of the bridges and before the corporators could be reimbursed, by the state establishing free or other bridges within the prescribed limits. This argument supposes that a state will act in bad faith; which supposition is not to be entertained. All experience attests the fact that the failure to realize any just expectations of remuneration from franchises of this character has never been attributable to broken public faith; and these applicants for the franchises know and act accordingly. The object in introducing the provision, and the object it was intended to serve, seems to me plain. Without it, the riparian owners might have established a free bridge or ferry; the superintendents and commissioners of highways might have laid out highways and constructed bridges across the river,

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and the court of common pleas have allowed ferries to be established across them, so as to have impaired if not wholly destroyed the franchises. There were sufficient parties and officers and public authorities for the provision to apply to, and so that it might have full effect without extending its operation to the state or the legislative authority. It is quite unnecessary to hold that it is or was intended as a restraint upon the legislative power to give full force and effect to the language employed. Certainly the intention to surrender the sovereign authority to private corporations ought *never to be implied*; nor should the language of a statute be so construed as to deprive the state of her power to provide for the best interests of the people by appropriate and useful legislation, if it be susceptible of a different and reasonable construction. There is great force in the remark of Chief Justice TANEY, in the case of *The Charles River Bridge* agt. *The Warren Bridge* (11 Peters, 420), that "a state ought never to be presumed to surrender this power, because the whole community have an interest in preserving it undiminished;" "and when a corporation alleges that a state has surrendered its power of improvement and public accommodation, the community have a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose to abandon it does not appear."

Upon the whole, I do not think the plaintiffs were entitled to sustain the action. The grant to them was the right to maintain a bridge across the Chenango river at or near Chenango Point, and take certain rates of toll for crossing it; and this was the whole grant. There was no monopoly over the waters of the Chenango river, above and below their bridge, given to them; nor any undertaking by the state, in the act incorporating them, not to sanction competition, nor to make improvements that might diminish their income. In this respect they have no rights

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to be impaired, and consequently none which the courts are called upon to protect.

The judgment of the supreme court should be affirmed.

DAVIES and ROSEKRANS, JJ., concurred on both the grounds stated in the opinion. SELDEN and MARVIN, JJ., were for affirmance on the ground that the legislature did not conclude itself; the prohibition of the act is not a restraint of the legislative power.*

SUPREME COURT.

THE PEOPLE *ex rel.* STEPHEN L. COOK agt. THE BOARD OF METROPOLITAN POLICE.

The relator having been convicted, by the board of metropolitan police, of being *absent from duty* for a certain prescribed period, and at the time of such conviction the law made the offence punishable only in case of absence from duty *without leave*:

Held, that the return to the common law *certiorari* bringing up such conviction, not showing that the absence was *without leave*, the relator was convicted of *no offence*.

Besides, it was wholly inconsistent to find the relator guilty of neglect of duty for absence during the time the board had *unlawfully dismissed him from service*.

New York General Term, December, 1863.

SUTHERLAND, LEONARD and BARNARD, *Justices.*

APPEAL from judgment at special term (*reported 25 How. Pr. R. 79*). This is a common law *certiorari* to review the judgment of the board of police, deducting by fine the pay

* If this case goes to the supreme court of the United States, it would not be surprising, perhaps, under several decisions of that court, if it came to a different conclusion from this court—whether it would not consider the *whole franchise* to the Chenango Bridge Company *an entire and indivisible contract*, after its acceptance by that company; and the legislature having reserved in the franchise no right or power to alter, amend or repeal any portion of it, any subsequent interference by the legislature, to the detriment of the corporation, with *any part of the executed contract*, would not come within the prohibitory clause in the constitution. That is, whether the legislature had *impliedly* reserved their sovereign power as to one portion of the contract and not as to the other, so as to exercise it in that way at its election.—R.M.P.

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of the relator, as a member of the police force, from the 26th day of October, 1861, to the 8th day of January, 1863. It appeared by the return to the *certiorari*, that on the 19th day of January, 1863, the then superintendent of police, John A. Kennedy, preferred to the board charges against said Cook, of "neglect of duty," and specified, as the ground thereof, that said "Cook was absent from duty and from the station-house of the ninth precinct, from October 26, 1861, to the 8th day of January, 1863." It also appeared by the return, that the relator had been removed from the police force, by the judgment of the board, in the fall of 1861, just prior to the alleged absence; that the judgment of removal continued in force till just before the preferring of the present charge, when the order of removal was reversed by this court, and Cook returned to his prior position on the force.

A. J. VANDERPOEL, *for the board, appellants.*

Wm. HENRY ARNOUX, *for the relator, respondent.*

By the court, BARNARD, Justice. The relator was charged with neglect of duty by reason of being absent from duty from October 26, 1861, to 8th January, 1863.

Of this charge he was convicted. The effect of this conviction is, that he was convicted simply of being absent from duty for the period mentioned.

This conviction was for a matter which at the time of its rendition constituted no offence.

As the rules stood at the time of this conviction, the conviction could only be for absence from duty without leave. The wording of the by-law clearly makes the offence to which the penalty is attached absence without leave. So far as the proof is concerned, it perhaps would be incumbent on the accused, after the prosecution had shown absence from duty, to show that he had leave, otherwise it would be presumed that he had not leave. However

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this may be, it is absolutely necessary that the record should show a conviction for some offence punishable by the court which, or the magistrate who, convicts. The record in this case, for the reasons above stated, does not show any such conviction.

Conceding that, by the law as it stood prior to its amendment, absence with or without leave constituted an offence, to which a penalty was attached, yet that law having been amended so that absence with leave constituted no offence, no conviction could be had after such amendment for an absence with leave.

It is not necessary now to inquire as to how far a common law *certiorari* brings up the evidence, and as to how far the court will, on such *certiorari*, examine into the merits; but it may be observed that, from the opinion of Judge EDMONDS in *Morewood agt. Hollister* (6 N. Y. 327), and the cases cited by him, it would seem that to a writ of *certiorari* in cases of summary conviction the whole evidence which applies to the charge must be set out, that the court may judge whether sufficient proof appears on the face of it to sustain every material allegation and to justify adjudication.

I feel constrained, however, to remark, that the judge at special term was not too strong in his language when he characterized the action of the board of police commissioners in this case as a proceeding which shocks one's sense of justice. I would merely amend his exclamation by saying that the proceeding is such as to shock every man's sense of justice, excepting only that of the men then composing the board.

LEONARD, J. It is wholly inconsistent to find an officer guilty of neglect of duty for absence during the time he was unlawfully dismissed from service. The officer was not guilty of any offence for being absent at such time. The judgment ought to be affirmed, with costs.

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SUPREME COURT.

JAMES V. C. TELLER agt. GEORGE RANDALL and BENJAMIN M. BRIARE.

Where, on examination of a judgment debtor in *supplementary proceedings*, it appears that subsequent to the service of the order for such examination the defendant has conveyed, by bill of sale, personal property owned by him, to a creditor who claims to be a *bona fide* purchaser for value, the judge before whom the proceedings are pending has no authority to go on and *try the disputed question of title* as to such property. Such title can only be determined by *legal proceedings commenced expressly for that purpose by a receiver duly appointed*. (*This decision adds another to a number of others holding the same doctrine;—controlling among them is, Rodman agt. Henry, 17 N. Y. R. 482.*)

Albany General Term, December, 1862.

HOGEOOBM, PECKHAM and MILLER, Justices.

APPEAL by defendant Randall from an order made by the county judge of Albany county in proceedings supplementary to execution.

Upon the examination of the defendant Randall before the referee, it appeared that he had received money from the avails of property sold and disposed of since the service of the order upon him; which property, it was alleged, belonged to one Stone, and which the defendant claimed to have transferred to Stone by a bill of sale.

It appeared upon the examination that the defendant claimed to be indebted to Stone for liabilities incurred by him as indorser of notes, and, prior to the service of the order, executed to Stone a bill of sale of the personal property sold by him, including also other personal property. On the 18th of September, 1862, the county judge made an order that the defendant show cause before him, on the 22d of September following, why an attachment should not be issued against him, and he be punished for a contempt, for selling, disposing of and interfering with his property since the service of the first order.

The defendant appeared, interrogatories were filed, and

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the defendant answered substantially as upon his examination under the first order. The affidavit of Stone was also introduced, showing that he, Stone, claimed to own the property sold and disposed of by the defendant, under the bill of sale to him, as stated by the defendant. The county judge thereupon made an order that the defendant was guilty of misconduct in having disposed of the property in violation of the first order, and adjudged that he pay a fine of sixty-five dollars (that being the value of the property) to the plaintiff; and that an attachment issue against the defendant, and that he be committed to the county jail of Albany county until the said fine was paid.

JOHN D. LIVINGSTON, *for defendant.*

J. LAWSON, *for plaintiff.*

By the court, MILLER, Justice. The question presented upon the appeal arises under the provisions of the Code in regard to proceedings supplementary to execution.

The proceedings were instituted under section 292, and it is provided by section 297 that the judge may order the property of the judgment debtor, not exempt from execution, in the hands of either himself or any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment. It is, however, quite obvious from section 299, that it was not intended that the judge should proceed to try the title to property, when it was disputed, and summarily to determine to whom it belonged. The proper course to be pursued in such cases would be to appoint a receiver, and by an action to test any question which may arise as to the validity of the claim. In the case of *The People agt. King* (9 How. 97) it was decided that in supplementary proceedings, where the title to funds in the hands of the defendant is in dispute, claimed by persons other than the defendant, it was improper to make an order that the defendant pay over the money and apply it

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directly in satisfaction of the judgment; and that the judge had no authority to try and determine, in this summary manner, these conflicting claims. (*See also Sherwood agt. Buffalo R. R. Co.* 12 *How.* 139; *Rodman agt. Henry,* 17 *N. Y.* 484.)

Under the cases cited, I do not think that the county judge was authorized to make the order imposing a fine upon the defendant.

Although the property which was claimed by Stone had been converted into money, and in this respect may be considered in somewhat of a different aspect from other property which might be seized on execution, yet I do not consider that this fact alters the principle applicable to the case. The judgment debtor claimed that it belonged to a third party, who also claimed to own it. With these conflicting claimants the title could only be determined by legal proceedings commenced expressly for that purpose.

It is said that the appointment of the receiver would be of no avail, as the debtor was irresponsible and insolvent, and the money could only be reached and applied by the order of the judge, to pay it over to the judgment creditor. I do not think that this view of the case can be sustained.

The very same end could be accomplished in another way, and quite as effectually. While the judge had no power to decide a disputed question as to the ownership of the money, in this summary manner, he had full authority to order the appointment of a receiver, who might bring an action against the claimant to test the question of ownership. (17 *N. Y.* 384.) Here was a full and adequate remedy, and in accordance with what I understand to be the practice in similar cases. The county judge actually determined the whole question of title by his proceedings. This, I think, he had no right to do; and the proceedings should be reversed, with \$10 costs of appeal.

PECKHAM, J., dissented.

Hartley agt. Tatham.

NEW YORK SUPERIOR COURT.

JOSEPH W. HARTLEY, appellant agt. **BENJAMIN TATHAM and WIFE**, impleaded, &c., respondents.

The *assignee* of a mortgage takes it subject to *all equities* existing in favor of the *mortgagor*, or of any person who succeeds to his estate, at the time of the assignment. (See *S. C. 24 How. Pr. R.* 505.)

Therefore, where the assignee of a contract for work and labor, which the *mortgagor* of the premises had agreed with the assignor of the contract to allow on the mortgage, when completed, and the assignee having also acquired the title of the *mortgagor* to the mortgaged premises:

Held, that although the *mortgagor* had assigned the mortgage, the assignee of the premises and the owner of the debt due upon the contract could not only require the *mortgagor*, while he held the mortgage, but his *assignee* afterwards, to deduct the amount of such debt from the mortgage.

And such assignee and owner is not *estopped* from asserting such equity, by reason of his immediate grantor of the premises having *assumed the mortgage for the whole amount and agreed to pay it*. There being no covenant by the grantee which would run with the land and bind those who succeeded to his estate, it was a mere personal obligation, implied by the acceptance of the deed, and upon which an *assumpit* could be raised in favor of the holder of the mortgage. The owner of the premises, at the time of the foreclosure of the mortgage, stands in no relation of *surety* in respect to the mortgage debt, and cannot in any way be affected by the purely personal obligation of his grantor.

Besides, the doctrine of *estoppel* does not apply to such a case, because the deed to the owner's immediate grantor, in which the payment of the whole mortgage was assumed, was executed and delivered before the *contract for the work and labor with the mortgagor was made*, when the whole mortgage debt was due. This equity arose afterwards; and the plaintiff having purchased the mortgage *after this equity accrued*, took it subject thereto.

New York General Term, December, 1863.

MONCRIEF, ROBERTSON and MONELL, Justices.

THIS action was for the foreclosure of a mortgage, and was tried by a justice of this court, without a jury.

On the 30th of May, 1860, Michael Cunningham executed and delivered the mortgage in question to Samuel W. Dunscomb, to secure the payment of the sum of fifteen hundred dollars, part of the purchase money for the conveyance of the same premises by Dunscomb to him on the same day. On the first of June of the same year, Cunningham conveyed the same premises to James J. Smith,

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subject to the mortgage which Smith assumed and agreed to pay. On the 26th of January, 1862, Smith conveyed the premises to the defendant Tatham, subject to the same mortgage. The latter conveyance contained no assumption of the mortgage, nor any agreement on the part of Tatham to pay the same. On the 23d of April, Dunscomb, the mortgagee, agreed to sell eight lots of land (including the premises afterwards mortgaged by Cunningham) to one Higgenson, he, Higgenson, agreeing to erect thereon eight dwelling-houses; the conveyance to be delivered when the houses were completed, subject to \$5,500 of mortgage. Subsequently, in March, 1861, Higgenson assigned this agreement, with the consent of Dunscomb, to one Arment, he, Dunscomb, agreeing to convey the eight lots and houses to Arment when the plumbing work was finished. In the fall of the same year, Arment agreed with Dunscomb to do certain work in the Beekman Hill chapel, which Dunscomb was then building, Dunscomb agreeing to pay Arment therefor by deducting the amount from the \$1,500 mortgage from Cunningham to him. The plumbing work was done, and the amount thereof (\$490.03) was certified and agreed to by Dunscomb.

At the time of the conveyance by Smith to Tatham, which was done by request of Arment, he agreed to assign to Tatham, and subsequently, on the 3d of May, 1862, did assign to Tatham his interest in the agreement between Dunscomb and Higgenson, and also his claim against Dunscomb for the plumbing work upon the chapel, and his agreement in respect thereto.

On the 13th of May, 1862, Dunscomb assigned the \$1,500 mortgage (mortgage in suit) to the plaintiff.

On the 9th of July, 1862, Tatham tendered to the plaintiff the balance of principal and interest due on the mortgage after deducting the \$490.03, the amount of the plumbing bill on the chapel, and also the costs of the suit, which was refused.

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The conclusions of law from the foregoing facts were :

First. That the sum of \$490.03, for work, &c., done in the Beekman Hill chapel, under the agreement between Dunscomb and Arment, was a payment *pro tanto* on the mortgage.

Second. That such payment must be applied to the interest, and being so applied there was no interest due at the commencement of the suit.

Third. That by force of the several agreements, and the assignments and conveyance to Tatham, he was substituted in the place of the mortgagor and of Arment, with all their rights.

Fourth. That the tender by Tatham to the plaintiff of the balance of principal and interest due, extinguished the lien of the mortgage.

A judgment was entered in conformity with these conclusions, from which the plaintiff appealed.

D. M. PORTER, *for appellant.*

A. CLARKE, *for respondent.*

By the court, MONELL, Justice. The assignee of a mortgage takes it subject to all the equities existing in favor of the mortgagor, or of any person who succeeds to his estate, at the time of the assignment (24 *How. Pr. R.* 505); and hence, Tatham's right to require the application of the plumber's bill towards the payment of the mortgage was as perfect as if Dunscomb had continued the owner of the mortgage. Tatham, by the assignment from Arment to him, succeeded to all the rights of Arment under his agreement with Dunscomb, and could have required Dunscomb, while he held the mortgage, or his assignee, afterwards, to deduct the amount of the plumbing work from the mortgage. It operated, therefore, as a payment *pro tanto*, and left only the balance due on the mortgage.

The mortgage, by its terms, was not payable until the

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30th of May, 1863; but it contained a provision that, if default was made in the payment of interest, the whole principal shall, at the option of the mortgagee, become immediately due and payable.

The plaintiff, in his complaint, elected to have the principal due, and the defendant had then the right, although after suit brought, to tender the amount of principal and interest due, and such tender, and a refusal to receive it, would extinguish the lien of the mortgage. (*Kortright* agt. *Cady*, 21 *N. Y. R.* 368.)

It is objected that Tatham is estopped from asserting the equity derived under the assignment from Arment, inasmuch as his immediate grantor had assumed the mortgage for the whole amount, and agreed to pay it.

The general rule in respect to estoppels by deed is, that a man shall not be permitted to make any averment which contradicts the record of which he is a party. In other words, that he shall be concluded by the admissions in the deed to which he is a party. Hence, the grantee is estopped by the admissions of the grantor in the deed.

This rule, however, is not of uniform application, and it is unavailing except as between the immediate parties and privies of blood or estate. To a stranger it is wholly unavailable. (*Jackson* agt. *Bradford*, 4 *Wend. R.* 619; *Jewell* agt. *Harrington*, 19 *id.* 471.)

In *Jewell* agt. *Harrington*, the deed conveyed the premises "subject, nevertheless, to the right of dower of Cloe Jewell, who was the widow of Samuel Nash, deceased, who was the former proprietor of the above described premises," and the court held the grantee was not estopped from contesting the plaintiff's claim for dower. They say the plaintiff is not privy to the deed in any way, but a stranger who had no interest or concern with it.

The only effect of the assumption of the mortgage by Smith was to make him surety for Cunningham, the mortgagor, and he became personally liable for the payment of

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the debt of the latter to the holder of the mortgage. (*Halsey* agt. *Reed*, 9 *Paige R.* 446; *Russell* agt. *Piston*, 7 *N. Y. R.* [3 *Seld.*] 171.) There was no covenant by the grantee which would run with the land and bind those who succeeded to his estate. It was a mere personal obligation, implied by the acceptance of the deed, and upon which an assumpsit could be raised in favor of the holder of the mortgage.

Even if Smith, who had assumed the mortgage, had been the owner of the premises at the time of this foreclosure, he would not be estopped by the recital in his hands. As Dunscomb, the mortgagee, was not bound by them, Smith would not be; for there must be reciprocity to render an estoppel available. (*Lansing* agt. *Montgomery*, 2 *Johns. R.* 382.) But there is nothing in the assumption by Smith which binds his grantee. The defendant Tatham stands in no relation of surety in respect to the mortgage debt, and cannot in any way be affected by the purely personal obligation of his grantor.

There is, however, another reason why the doctrine of estoppel does not apply to this case. The deed from Cunningham to Smith, which recites the mortgage, and which, it is claimed, should operate as an estoppel, was executed and delivered before the agreement between Dunscomb and Arment, respecting the plumbing work, was made. At that time the whole amount of the mortgage was secured and unpaid, and it was proper for Cunningham to sell subject to, and for Smith to assume, the whole mortgage. The equity which was transferred to Tatham arose afterwards. The agreement with Arment for the plumbing work, and the performance of it by Arment, was after the assumption by Smith of the mortgage, and while Dunscomb was the holder of it.

It is clear, therefore, that in the hands of Dunscomb the plumber's bill would have been a good set-off against the

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mortgage, either by Smith, had he taken the bill, or by Tatham, who did take it.

The plaintiff purchased the mortgage after all this took place, and he took it subject to these equities, which in my opinion were not defeated nor extinguished by the subsequent transfer of the mortgage to the plaintiff.

My conclusions are, that Tatham, having received, by transfer, the bill for plumbing work performed by Arment, under his contract with Dunscomb, could require its application as payment *pro tanto* on the mortgage, and that the tender of the balance due on the mortgage, and the refusal of the plaintiff to receive it, extinguished the lien of the mortgage.

The conclusion of the learned justice was therefore correct, and the judgment should be affirmed, with costs.

SUPREME COURT.

JOSIAH T. SHORD agt. HENRY DWIGHT.

Since the amendment of the 307th section of the Code, in 1858, there has been and is no limitation to the number of term fees in the court of appeals, taxable under subdivision 7 of that section. (This agrees with Adams agt. Perkins, 25 How. Pr. R. 368.)

New York General Term, December, 1863.

APPEAL from taxation of costs.

B. C. THAYER, for appellant.

TRACY, POWERS & TALLMADGE, for respondent.

By the court, SUTHERLAND, P. Justice. The question of costs presented by the appeal was recently carefully examined by Judge Bosworth, of the superior court, in *James B. Glentworth agt. Richard E. Moore and others*, and he came to the conclusion that, since the amendment of 1858 of sec-

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tion 307 of the Code, there has been and is no limitation to the number of term fees in the court of appeals, taxable under subdivision 7 of that section. A copy of his opinion having been handed to the court, I have examined it with care, and entirely agree with him. Judge PARKER arrived at the same conclusion in *Adams agt. Perkins* (25 *How. Pr. R.* 368). The order appealed from should be reversed, with \$10 costs, and the clerk should be directed to readjust the costs; and allow the \$120 for the twelve term fees.

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SUPREME COURT.

FOSTER agt. BRYAN.

It is not a condition precedent to its validity, that the report of a referee be made within sixty days.

The referee forfeits his fees by his neglect to make the report within sixty days, but this is a penalty imposed only on him.

It is the right of either party to proceed as though no report had been made, if it is not made in sixty days. But where both parties wait till the report is made and delivered, without attempting to proceed in the action, the objection that the report was not made in sixty days is thereby waived.

New York Special Term, December, 1863.

MOTION by defendant to set aside report of referee and the judgment thereon, on the ground that the report was not made within sixty days after final submission of the cause to the referee.

F. HART, for defendant

Mr. CUMMINS, for plaintiff

LEONARD, Justice. The referee failed to deliver his report within sixty days from the time the action was finally submitted to him, but no step was taken by either party to proceed in the action, as though no reference had been ordered, until after the report was made and deliv-

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ered. The defendant, against whom the referee has reported, now insists that the report is void, and that the referee had lost all right to make any report in the action by his neglect to report within the time prescribed by section 373 of the Code.

The clause in question was added to this section in 1862. It is remedial in its character, and must be construed liberally for the benefit of the public. It is also directory. It contains no words negativing the validity of a report made after the expiration of sixty days. The referee forfeits his fees by his neglect, but this is a penalty imposed only on him.

It is the right of either party to proceed as though no reference had been ordered. But in this case neither party availed himself of the right. Both waited till the report had been delivered, without attempting to proceed in the action.

There is no limitation imposed upon the power of the referee to make a valid report, although more than sixty days have elapsed, unless one of the parties has taken some step manifesting an intention to proceed as though no reference had been ordered. (*The People agt. Allen*, 6 Wend. 487; *Gale agt. Mead*, 2 Denio, 180, and other cases there cited; *Thomas agt. Clapp*, 20 Barb. R. 165.)

It is not a condition precedent to its validity that the report be made within sixty days. (*The People agt. Holley*, 20 Wend. 481.)

The motion to set aside the report and the judgment is denied, but, as the question is novel, without costs.

The referee swears that the counsel for both parties consented that he might take his time to make his report. This answers, I think, the objection to the adjustment and allowance of the referee's fees.

People *ex rel.* Cole agt. Alden.

SUPREME COURT.

THE PEOPLE *ex rel.* CYRUS COLE agt. ADELINE ALDEN.

Under the act of 1863, amending the Revised Statutes relating to "summary proceedings to recover the possession of land," the *affidavit* upon which the process is issued by the *district courts* in the city of New York *must be sworn or affirmed to before the clerk or his deputy*. If not so sworn to, all subsequent proceedings, with the affidavit, *are void*.

New York General Term, December, 1863.

SUTHERLAND, P. J., LEONARD and BARNARD, *Justices.*

CERTIORARI to a district court in the city of New York to review summary proceedings, &c.

By the court, SUTHERLAND, P. Justice. The concluding words of the first section of the act of April 20, 1863 (*ch. 189, Laws of 1863*) are too plain and explicit to permit an argument or speculation as to the intention of the legislature.

These words are, "and the affidavit upon which the process is issued shall be sworn or affirmed to before and filed with the said clerk or his deputy." By the process is meant the summons for the tenant to remove from the premises or show cause;—only one affidavit for the summons or process is contemplated either by the act of 1863, or by the provisions of the Revised Statutes which the act of 1863 amends. The whole proceeding is a special statutory proceeding, and, when the act of 1863 says that the affidavit, &c. shall be sworn or affirmed before the clerk or his deputy, it in effect says that it shall not be sworn to or affirmed before the justice or any officer or person other than the clerk or his deputy.

In this case the record shows that the affidavit upon which the summons was issued was sworn to before Mr. Bull, the justice. The summons and all subsequent proceedings were, therefore, irregular and void.

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It seems that the clerks of district courts, independent of the act of 1863, have power to administer oaths by the 75th section of the act of April 13, 1857.

In my opinion, the proceedings before the magistrate must be reversed or set aside on the ground above stated alone, without examining any other question in the case.

Act passed April 20, 1863, chapter 189, Laws of 1863.

"SEC. 1. All proceedings had and process issued under the provisions of article 2, title 10, chapter 8, part 3 of the Revised Statutes, in the city of New York, by any justice of the district courts thereof, shall be had, and issued, and be made returnable before a justice of the district court, in the district in which the premises of which the possession is sought to be recovered are situated, and all such process shall be made returnable by the clerk of said district court, at the court thereof, and the affidavit on which the process is issued shall be sworn or affirmed to before and filed with the said clerk or his deputy.

"SEC. 2. This act shall take effect immediately."

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SUPREME COURT.

EZRA GOULD agt. JOHN MORTIMER, Jr. and others.

Every person whose rights are injuriously affected by a judgment or proceedings under it, in a *foreclosure suit*, has the right to move the court to set aside or annul them, although he is *not a party to the suit*.

And if the party is so connected with the foreclosure suit as that he could have moved in that suit to set aside the sale, then he cannot maintain an action to accomplish that object. His remedy is by motion in the original suit.

New York Special Term, December, 1863.

THIS action is brought by the plaintiff, who is the owner of the equity of redemption of premises lying and being in this city, mortgaged by one Nash to the defendant Morti-

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mer, to secure the payment of \$8,000 one year from 15th October, 1860, to set aside a sale of said premises made pursuant to a decree of foreclosure of said mortgage. The plaintiff purchased in November, 1861, subject to said mortgage, but his deed from Nash was not recorded, and he was not, for that reason, made a party to the foreclosure suit.

E. W. Dodge, for plaintiff.

Wm. Henry Arnoux, for defendants.

MULLIN, Justice. The grounds on which it is sought to set aside the sale are :

1st. That it was made at a season of the year when purchasers who attend sales of real estate were accustomed to be and were in fact out of the city.

2d. The sheriff, to whom the making of sale was committed, refused to postpone it, although requested so to do.

3d. That the premises did not bring as large a price as they would have done if sold at another and more propitious season.

4th. That the plaintiff's agents delivered to the sheriff, before the sale, a diagram on which was marked the location of certain buildings standing on the premises, and that such location was erroneous, and that the lots on which said buildings actually stood sold for much less than they would have sold for had the true location been known to the purchasers.

5th. The sheriff sold a much larger number of lots than was necessary in order to raise the amount due on the mortgage and the costs of the foreclosure.

When the cause was called and the counsel had stated the case, I dismissed his complaint on the ground that his remedy was by motion in the foreclosure suit to set aside the sale, and not by action.

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A motion is made for a new trial, and the questions presented are :

1st. Will an action lie by one person to set aside a foreclosure sale on account of mere irregularities in the sale ? and

2d. If it will not lie in favor of persons party to the foreclosure suit, will it lie in favor of the plaintiff who was not a party, and who could not, as it is said, make a motion in the foreclosure suit to set aside the sale ?

The chancellor held, in *Brown* agt. *Frost* (10 *Paige*, 243), that an original bill in chancery cannot be filed by a party to a foreclosure suit to set aside a master's sale under a decree, when relief could have been obtained by a summary application to the court in the foreclosure suit.

The same is held in *Requa* agt. *Rea* (2 *Paige*, 339); *Collier* agt. *Whipple* (18 *Wend.* 224); *Nichol* agt. *Nichol* (8 *Paige*, 349); *Am. Ins. Co.* agt. *Oakley* (9 *Paige*, 259).

If, then, the plaintiff in this case is so connected with the foreclosure suit as that he could have moved in that suit to set aside the sale, then he cannot maintain this action within the principle of the cases cited.

That he was not actually a party is conceded. But his grantor was a party, being the mortgagor, and the plaintiff was in privity with him and bound by the decree, although not actually a party to the action.

Every person whose rights are injuriously affected by the judgment or proceedings under it, has the right to move the court to set aside or amend them, although he is not a party to the suit.

This has repeatedly been held in regard to judgments entered on defective confessions, or in fraud of creditors. (See *Abbott's Digest, Confession of Judgment*, 624, § 102 *et seq.*; same, *Motions*, 78, § 32 *et seq.*)

The case of the *American Insurance Company* agt. *Oakley* (9 *Paige*, 259) is decisive on this question, and, indeed, of this motion for a new trial. In that case a junior judg-

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ment creditor, not a party to a foreclosure suit, made a motion to set aside a sale, on the ground that the property did not bring as much as it should and would have done had it been sold in parcels, instead of in gross, as it was sold by the master. The judgment creditor was ignorant of the fereclosure and sale. The chancellor vacated the sale, and directed a resale upon terms.

In that case the creditor was not a party, yet he was permitted to move, on the ground that the sale injuriously affected his interests in the property. In that case the moving party was ignorant of the whole proceedings, yet he was not turned over to another action, but had relief summarily on motion. If such a party could be relieved on motion, I see no reason why this plaintiff has not a right to relief in the same way, if he has not forfeited by his laches or some other act which would render it inequitable to grant him relief.

The motion is denied, with costs.

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SUPREME COURT.

NATHANIEL L. GRISWOLD agt. LANGDON H. HAVEN and
others.

Where a cause has been tried at the circuit, and a verdict and judgment rendered for the plaintiff; and from that judgment the defendants appeal to the general term, and obtain an order for a new trial; and from that order the plaintiff appeals to the court of appeals; which court make an order reversing the judgment of the general term, and directing *judgment to be entered on the verdict*; and thereupon, on filing the remittitur, an order is entered in the court below making the judgment of the court of appeals the judgment of the court below:

Held, that the court below have no right to go behind that *judgment and inquire into its regularity*. If, as the defendants contend, the verdict was subject to an adjustment, and that adjustment had not taken place, they should have applied to the court of appeals to correct it when the cause was in that court.

An *error*, that the amount of the judgment exceeded the amount of the verdict and interest, could be corrected on *special motion in the court below*.

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New York General Term, November, 1863.

SUTHERLAND, INGRAHAM and LEONARD, Justices.

APPEAL to the general term from an order for judgment entered on filing remittitur from the court of appeals.

By the court, INGRAHAM, Justice. We do not feel ourselves at liberty to say to the court of appeals that their judgment is erroneous, nor to send back this case to them for the purpose of intimating to them that any error has been committed, and asking them to review their former decision. That judgment reversed the judgment of the supreme court, and ordered final judgment for the plaintiff upon the verdict.

An order has been entered in this court, making the judgment of the court of appeals the judgment of this court, on filing the remittitur. We think we have no right to go behind that judgment and inquire into its regularity. We are bound to suppose that any objection which existed thereto would have been brought before that court. If the defendants have not availed themselves of any objection, on the ground of regularity, it is now too late and not in the power of this court to grant any relief.

We are also of the opinion that the defendants are concluded by the omission to object to the regularity of the proceedings before the case went to the court of appeals. The cause was tried at the circuit, and a verdict was rendered for the plaintiff. From that judgment the defendants appealed, and obtained an order for a new trial. Such order has been reviewed in the court of appeals, and an order made directing judgment to be entered on the verdict. By that order we are controlled in this court. The defendants contend here, that the verdict was subject to adjustment, and that such adjustment has not taken place.

It is true that the order for a new trial rendered any adjustment in this court impossible. But if the amount was erroneous, such adjustment could have been made in

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the court of appeals. They ordered judgment on the verdict. We can give that order no other interpretation than that the court were satisfied the amount of the verdict was correct, and therefore gave the plaintiff judgment therefor.

In one or two cases, the superior court refused to interfere with the judgment entered on the remittitur, or direct the remittitur to be taken from the files, except upon some suggestion from the appellate court that the judgment entered thereon did not conform to the judgment of the appellate court. (3 *Sandf.* 683; 1 *Duer*, 502.) If there is any error of that kind in the judgment, a new appeal could be taken, if the court would not so order. If the order entered is wrong, that court will correct it, on motion, although the remittitur has been filed below. (1 *Seld.* 455.)

Something was said upon the argument, and it appears in the papers, that the amount of the judgment exceeds the amount of the verdict about \$5,000. How that difference was made does not appear. The plaintiff had a right to tax his interest, but that would not make the amount. The papers, however, do not present the facts so that we can pass upon them on this appeal, nor does it appear to have been presented to the court below. If there is any error in the amount, the defendants may move to have the amount corrected at special term.

In all other respects, we think we have no power to interfere.

The order appealed from should be affirmed, with \$10 costs, with liberty to defendants to move, at special term, to correct the amount of the judgment, if any error in the computation has occurred.

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SUPREME COURT.

FIELDEN and others agt. CARELLI and LAHENS.

Where only *part of an answer* is demurred to, the defendant, under *leave to amend*, can only amend the defective portion of the answer, and cannot set up new defences; but he may add, to the part demurred to, anything which would strengthen the defence as originally made, even if such matter had from any cause been passed over and left unanswered in the first pleading.

New York General Term, November, 1863.

SUTHERLAND, INGRAHAM and LEONARD, *Justices.*

MOTION by plaintiff to strike out part of defendants' amended answer.

JEREMIAH LAROCQUE, *for plaintiff.*

Wm. CURTIS NOYES, *for defendants.*

By the court, INGRAHAM, Justice. The plaintiff demurred to one of the defences stated in the answer, and on the decision thereon leave was granted to amend on payment of costs.

An amended answer was served containing the defence, formerly demurred to, and avoiding the defects in the former answer. The defendant added to the defence also a statement of absence from the county at a particular period, to deny the allegation that he had accepted a trust under an assignment. The former answer did not deny such acceptance, and therefore it was admitted.

The plaintiff moved to strike it out; which motion was denied at special term, and the plaintiff appealed.

This matter is not added as a separate defence, but as intended to aid the defence formerly demurred to. Although it was not thought necessary in the former answer to set up these facts, still I know of no rule that would prevent the party under the Code from obtaining leave to amend in this respect. The omission to contra-

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dict an allegation in a pleading should not on such an application be considered equivalent to a direct admission of its truth. In the latter case some explanation would be required before a party would be allowed to make a contrary statement. Mere silence in an answer is not to be held to such a strict rule.

Where only a part of an answer is demurred to, the defendant, under the leave to amend, can only amend the defective portion of the answer, and cannot set up new defences; but he may add to the part demurred to anything which would strengthen the defence as originally made, even if such matter had from any cause been passed over and left unanswered in the first pleading.

On motion such an amendment would be allowed (*Macqueen* agt. *Babcock*, 22 *How. Pr. R.* 229; *Spencer* agt. *Tooker*, 21 *How. Pr. R.* 333), and defendant could do the same under the right to amend of course, and might even add new defences. (*Hyman* agt. *Redmond*, 18 *How. 272.*)

Under the enlarged system of amendments introduced by the Code, it seems to be only in accordance with the whole scope and intent of that statute to extend the rules of amendment much further than were formerly in practice.

We think the order at chambers was proper and should be affirmed.

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SUPREME COURT.

ADOLPH HAMMER agt. **CHARLES N. BARNES**, impleaded with
A. B. NASH & Co.

A scientific invention, claimed to be an improvement in the manufacture of malt liquors, is the subject of protection by injunction by the state courts, whether or not the invention is of such a nature that it could be patented.

Where the plaintiff shows that he will be entitled to final relief by injunction or otherwise against any person, although such person is not a party to the contract alleged to be violated, he is properly made a party defendant.

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Persons having *no interest* in the controversy, although they are general partners of the plaintiff, cannot properly be made *parties plaintiff*.

Persons who have acquired from the defendants a knowledge of a secret invention for which the plaintiff claims protection, are not necessary parties.

New York Special Term, November, 1863.

THIS case came up on argument before the court on demurrer interposed by the defendant Charles N. Barnes to the plaintiff's complaint.

It appeared from the plaintiff's complaint that he had devoted many years of labor and scientific research to the art of brewing ales, especially with reference to their keeping qualities in hot weather; in the course of which he had discovered an art and process of manufacturing an ale which had become celebrated throughout the United States for its keeping qualities, and the superiority of the article as well as its economy in manufacture; that such discovery was of such a nature that it could not be patented; consequently the plaintiff was in the habit of teaching it to different brewers for a valuable consideration, they binding themselves to keep it secret. The complaint further averred that A. B. Nash & Co., who were brewers in Troy, applied to the plaintiff for a knowledge of his secret, which the latter, for a valuable pecuniary consideration, agreed to impart to them, and thereupon an agreement was entered into between the plaintiff and A. B. Nash & Co., to the effect that the plaintiff imparted to them his discovery, the said A. B. Nash & Co. binding themselves in a penalty of \$15,000 not to impart it to any one excepting their manager and agent, the defendant Charles N. Barnes, nor to suffer the knowledge of it to be acquired by any one through their negligence.

It further averred that the defendants broke their agreement, after having experienced the beneficial nature of the improvement, by secretly imparting the knowledge of the process to divers other large and extensive brewers in this

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city and other cities, whereby the plaintiff has been damaged \$35,000.

It also appeared that the defendants claimed and set up that they would teach that process to other parties, whereby the plaintiff's business as a teacher of the art of brewing would be broken up, and the aims and labors of a lifetime would be frustrated by the inequitable acts of the defendants.

The complaint concluded by praying judgment against A. B. Nash & Co. for \$35,000 damages, and for an injunction against all the defendants to prevent them from further disclosing the plaintiff's process.

To this the defendant, Charles N. Barnes, demurred.

JOHN TOWNSEND, *for defendant.*

1st. The supreme court had no jurisdiction, as the case was one properly cognizable by the patent laws of the United States, and not of this court.

2d. The defendant Charles N. Barnes was not a contracting party with the plaintiff, and therefore was improperly joined in this case as a defendant.

3d. The plaintiff should have joined his other partners with him, or should have made as parties defendants the persons to whom the defendants were alleged to have communicated the discovery.

D. McMAHON, *for the plaintiff.*

MULLIN, Justice, rendered judgment in favor of the plaintiff, overruling the demurrer, with costs ; holding it as his opinion, that in such cases the jurisdiction of the court was established by numerous decisions, and he should not now dispute it ; that in his opinion, if the plaintiff was entitled to any final relief by injunction or otherwise against Charles N. Barnes, he was properly made a party defendant.

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That the complaint showed that the plaintiff's partners had no interest in the controversy, and the parties who were supposed to have acquired the secret from the defendants were not necessarily parties.

Judgment in favor of the plaintiff, overruling the demurrer, with costs, with liberty to answer in twenty days.

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NEW YORK SUPERIOR COURT.

EDWARD MORRISON and another agt. JAMES S. STURGES and another.

The court has power to compel a *discovery of books and papers* containing evidence relating to the merits of the action, under the provisions of the Revised Statutes, as well *after issue joined as before*.

The 388th section of the Code is not a substitute for the provisions of the Revised Statutes, but *auxiliary thereto*. Under either statute the court must be satisfied that the books or papers contain evidence relating to the merits of the action.

It is not enough that the party believes or is advised that the paper contains material evidence. *Facts must be shown to support such belief.* Nor is it enough that the paper may, or even probably will, furnish information to obtain evidence which may be material. The paper itself must contain the evidence, either by itself or in connection with other proof.

Special Term, October, 1863.

PETITION by defendants, under the Revised Statutes, for a discovery of papers as evidence in the cause, alleged to be in the possession of the plaintiffs.

MONELL, Justice. It is settled by authority that the court has power to compel a discovery of books, papers or documents containing evidence relating to the merits of the action, under the provisions of the Revised Statutes, as well *after issue joined as before* (*Gould agt. McCarthy, 1 Kern. 575; Davis agt. Dunham, 13 How. 425*); the 388th section of the Code not being a substitute for the provisions of the Revised Statutes, but *auxiliary thereto*. Under

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either statute the court must be satisfied that the books or papers contain evidence relating to the merits of the action.

This action is to recover the value of \$1,000 of U. S. treasury notes, alleged to have been delivered with other similar notes by the plaintiffs to the defendants by mistake.

The petition on which this motion is founded alleges that the notes received by the defendants from the plaintiffs were bound by "paper straps," which purported to have memorandums of the amount of notes in each package, and which straps are now in the possession of the plaintiffs. For the discovery of these straps the motion is made.

The right to the possession of these straps by the plaintiffs is at least questionable. The petition alleges, and it is not denied, that the package of notes was delivered by the defendants' agents to a clerk of the customs in payment of duties, and that the plaintiffs afterwards obtained the straps from the custom house. If there was any property in the straps, they belonged to the government of the United States, and not to the plaintiffs, and they have no more right to them than the defendants. They are, however, in the plaintiffs' possession, and if they contain evidence relating to the merits of the action they should be discovered.

It is attempted to recover a \$1,000 excess of treasury notes delivered by mistake to the defendants, and it is claimed that upon these straps were memorandums purporting to denote the amount of notes contained in each package. It is difficult to see how these mere memorandums, *without further proof*, would be any evidence whatever of the contents of the packages which they bound. If they were written by the plaintiffs or their clerk or agent, or were necessary to refresh the recollection of a witness who had counted the notes and seen the memorandum, it might then be that they contained evidence relating to the merits of the suit.

We do not, upon these motions, judge of the weight of

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the evidence. If it be never so slight, the party is entitled to have it.

It is not enough that the party believes or is advised that the paper contains material evidence. Facts must be shown to support such belief. Nor is it enough that the paper may, or even probably will, furnish *information* to obtain evidence which may be material. (*Wood agt. De Figaniere, MS. opinion at general term.*) The paper *itself* must contain the evidence, either by itself or in connection with other proof.

The defendants' petition does not satisfy me that there is any evidence whatever in these memorandums which relates to the merits of the action. By whom they were made does not appear. If made by a stranger they would not be evidence for any purpose, except, perhaps, to refresh his recollection. There is no connection shown between the memorandums and the plaintiffs, and in the absence of facts I cannot guess or presume that possibly they may contain material evidence which the defendants ought to have.

Besides, if it was a doubtful question the court ought not, in its discretion, to apply so stringent a remedy as the one provided by the Revised Statutes, while there are other and efficient modes provided to attain the same end. The plaintiffs can now be compelled by a subpoena, *duces tecum*, to produce the straps, either upon an examination before or at the trial, if the court shall be satisfied that they contain material evidence.

The motion is denied, with \$10 costs to abide the event of suit.

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SUPREME COURT.

GEORGE L. FRANCE, late sheriff of Greene county agt. DAVID M. HAMILTON, JOHN SMITH, HENRY G. BEDELL, ISAAC BROWN, ALEXANDER REED and WHEELER POWELL.

The statutes of this state, requiring *county clerks* to keep open their respective offices during *certain hours each day* for the transaction of business, were intended, not only to compel the clerks to be at their offices during those hours, but to prescribe *rules and regulations* which should control the office where the business was transacted.

Therefore, *all judgments filed and docketed by a clerk out of office hours*, although some may be entered before others, must take effect and become *liens equally at the next office hour after such docketing*.

This rule does not apply to *executions delivered to sheriffs*; for business with sheriffs may be transacted *at other places besides their offices, and outside of office hours*.

Albany General Term, December, 1862.

HOGEBOOM, PECKHAM and MILLER, Justices.

CASE agreed upon by parties, and submitted pursuant to section 372 of the Code.

The Bank of Coxsackie recovered a judgment in the supreme court, against Charles Painter and others, for five hundred and twenty-eight dollars and ninety-eight cents damages and costs, which was entered and docketed in the office of the clerk of the said county of Greene, on the 14th day of August, 1861.

The above named David M. Hamilton and John Smith being at the time copartners in business, and, as such copartners, recovered a judgment in said supreme court, against the said Charles Painter, by confession, for one thousand and thirty-three dollars and twenty-nine cents damages and costs, which judgment was entered and docketed in the office of the clerk of the said county of Greene, on the 16th day of August, 1861, at eight o'clock in the afternoon.

David E. Wing recovered a judgment in the said supreme court, against the said Charles Painter, by confession, for

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five hundred and seven dollars and five cents, damages and costs, which judgment was entered and docketed in the office of the clerk of the said county of Greene, on the 16th day of August, 1861, at nine o'clock in the afternoon. The said Wing, on the 1st day of September, 1861, sold, assigned and transferred said judgment last mentioned to the above named Henry G. Bedell, who has since owned the same.

The above named Isaac Brown recovered a judgment in the said supreme court, against the said Charles Painter, by confession, for eight hundred and nineteen dollars and ninety-three cents, damages and costs, which judgment was entered and docketed in the office of the clerk of said county of Greene, on the 16th day of August, 1861, at fifteen minutes past eleven o'clock in the afternoon.

The above named Alexander Reed and Wheeler Powell, being at the time copartners in business, and, as such copartners, recovered a judgment in the said supreme court, against the above named Charles Painter, by confession, for one thousand and thirty-two dollars and nineteen cents, damages and costs, which judgment was entered and docketed in the office of the clerk of the said county of Greene, on the 16th day of August, 1861, at fifteen minutes past eleven o'clock in the afternoon.

The above named George L. France was sheriff of the said county of Greene from the first day of January, 1859, to the first day of January, 1862, and during the same time Peter Cook was a duly appointed and acting deputy sheriff under said France.

Executions against the property of the said Charles Painter were duly issued on each of the above judgments, and delivered to the said sheriff of the county of Greene, as follows: On said judgment in favor of the Bank of Coxsackie, August 16th, 1861, at 10 o'clock P. M.; on the said judgment in favor of David M. Hamilton and John Smith, August 17th, 1861, at 7 o'clock A. M.; on said judgment in

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favor of David E. Wing, September 14th, 1861, at 1 o'clock p. m. ; on the said judgment in favor of Isaac Brown, August 17th, 1861, at a quarter past seven o'clock a. m. ; on the said judgment in favor of Alexander Reed and Wheeler Powell, August 17th, 1861, at eighteen minutes past seven o'clock a. m. That said executions were received and executed by said sheriff, by and through his said deputy, Peter Cook. That by virtue of said judgments and executions, the real estate of the said Charles Painter, situate in the towns of New Baltimore and Coxsackie, in the said county of Greene, and on which the aforesaid judgments were a lien, was duly sold for the sum of \$2,294.25, on the 3d day of December, 1861, and after paying the balance due on the above described judgment in favor of the Bank of Coxsackie, and the costs and disbursements of the sale, including the poundage of the sheriff, there remained in the hands of the said sheriff the sum of \$1,754.05, of which sum the said sheriff, by his said deputy, paid to David M. Hamilton and John Smith, on the 18th day of December, 1861, to be applied on their said judgment, the sum of \$1,056.80, should they be legally entitled to the same, and to Henry G. Bedell, on the 18th day of December, 1861, to be applied on the said judgment in favor of David E. Wing, the sum of \$518.36, if the said Henry G. Bedell should be legally entitled to the same ; and the balance of said sum, being \$178.69, remains in the hands of said sheriff.

Questions of difference have arisen between the parties as to their respective rights in and to the said sum of \$1,754.05. The said David M. Hamilton and John Smith, and the said Henry G. Bedell, owner of the David E. Wing judgment, claim that they are entitled to payment of their judgments in full, because their judgments were first docketed in the office of the clerk of the county of Greene, and therefore their liens on the real estate were the oldest ; and the said Isaac Brown and the said Alexander Reed and Wheeler Powell claim that the four judgments above

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described, of David M. Hamilton and John Smith, David E. Wing, Isaac Brown, and Alexander Reed and Wheeler Powell, against said Painter, are each entitled to a *pro rata* share of the said \$1,754.05, for the reason that all of said judgments were docketed after five o'clock p. m. of August 16th, and before 9 o'clock a. m. of August 17th, 1861, and that the docketing of neither of said judgments took effect until 9 o'clock a. m. of August 17th, 1861.

The parties ask the decision and judgment of this court as to the legal rights of said parties respectively to the said sum of \$1,754.05, and also as to the costs of this proceeding.

A. J. PARKER, for Brown, Reed and Powell.

L. TREMAIN, for Hamilton and others.

By the court, MILLER, Justice. The question raised in this case involves the construction of the provisions of the Revised Statutes in reference to the time required for the docketing of judgments.

Second Revised Statutes, 285, section 54, as amended by Session Laws of 1860, chapter 276, provides that clerks of counties and of courts of record in this state, and the register of deeds in the city and county of New York, shall respectively keep open their several offices, for the *transaction of public business*, every day in the year, except Sundays and such other days as are and shall be declared by law to be holidays, in the city of New York, from nine o'clock in the forenoon to four o'clock in the afternoon, and in each of the other counties of the state, between the thirty-first day of March and the first day of October, from eight o'clock in the forenoon to six o'clock in the afternoon, and between the thirtieth day of September and the first day of April, from nine o'clock in the forenoon to five o'clock in the afternoon.

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There are but two reported cases in this state which have any bearing upon the precise point now considered.

In *Simon agt. Staats* (1 *Cow.* 592), where all the judgments were docketed before nine o'clock a. m., it was decided that among several judgments, that in which the record is first filed takes preference. And to determine this, the court will inquire into the fractional parts of a day. The case was decided in 1823, and before office hours were fixed by statute, and can therefore scarcely be regarded as decisive upon a question arising under a statute since enacted.

In *Warden agt. Mason* (10 *W. R.* 573), the question appears to have been raised and considered. The court, SUTHERLAND, J., presiding, observed, "that a party cannot gain a preference by filing a record *before the hour of nine o'clock in the morning*, that being the earliest hour at which the clerks of our court are required by statute to open their offices for the transaction of business, and that all records delivered at an earlier hour must be considered *as filed at the hour of nine.*" The case is not very fully reported, but sufficient appears to show that the point was under consideration.

The ninth rule of the supreme court makes provision that judgments shall only be entered and docketed in the offices of the clerks of the several counties, within the hours during which by law they are required to keep open their offices for the transaction of business. It would appear that the court designed by this rule to carry out the provisions of the Revised Statutes in the practice. I am also inclined to think that the authorities cited above tend to establish that all judgments docketed out of office hours must be considered as docketed within the office hours prescribed by the statute.

It is insisted, however, by the counsel for the judgment creditors, whose judgments were docketed out of office hours, that they became a lien the moment they were dock-

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eted in the county clerk's office, according to the express provisions of the statute (*Code*, § 282; 2 R. S. 359, §§ 4, 5 [3d ed. 3 R. S. 637]; 2 R. S. p. 360, §§ 14, 15); that the provision first cited has no bearing on the question, and though mandatory as to these hours, it does not prohibit a clerk from keeping his office open at other hours. The object of the statute was doubtless in part to compel the clerks of the counties to be at their offices during certain hours of the day for the transaction of business; but I am of the opinion that it was also designed to go a little beyond this, by prescribing *rules and regulations which should regulate and control the office where the business was transacted*. The record must be filed and the judgment docketed at the office; and there is certainly great propriety in making provisions as to the time within which the daily business should be done. Were it otherwise, it would to some extent vest a county clerk with power to determine the priority of liens. As there is no compulsory provision for the transaction of business beyond the hours fixed by law, he might docket judgments for some and refuse to do it for others; thus exercising a discretion dangerous to be intrusted, and liable to be abused. All this could be done with impunity, as it would be no good cause or legal ground of complaint that he declined to open his office for the transaction of business outside of office hours. I think that this provision of the statute was intended to remedy such a difficulty, and to place safeguards around the office and the officer so as to prevent abuse. If the intention was to give the clerk a discretionary power in this respect, the statute should have further provided that the clerk should be at liberty to open the office for the transaction of business at any other time he thought proper to do so. The failure to give such a power must be regarded as somewhat important.

It is said that the next section (2 R. S. 285, § 55, 5th ed. vol. 3, p. 475), requiring sheriffs to keep open their

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offices during the same hours, does not postpone the lien of an execution levied or received after those hours. It appears to me that it is a complete answer to this point to say, that it is not necessary that an execution should be received or levied at the office; whereas no records are in force until delivered and filed in the county clerk's office. It is also observable that the phraseology of the last section is somewhat different from the previous one. The words "for the transaction of business" are omitted; thus very properly conceding what is well understood, that business with the sheriff may be transacted at other places besides the office, and outside of office hours. The use of the language employed in the one section, and its omission in the other, is of singular significance, and clearly indicates that the legislature intended to make a difference. If they only meant to fix the hours when the clerk should keep open the office, the omission would have carried out such intention. They did so as to the sheriff, where the place of business was not important; and I think, in making an express provision for the transaction of business on certain days and within certain hours, they intended to say that business should be done at no other time.

I am better satisfied with this construction, because there is an eminent appropriateness in having some established rules in reference to a matter of so much consequence. The policy of the statute was to prevent any uncertainty; and the interest of creditors demands that rights so important should not be left to the discretion or judgment of a public officer who is not made accountable for an error in this particular. By the interpretation given, there is no chance of abuse; vigilant creditors stand upon precisely the same footing, and no advantage can be derived except what each one is fairly entitled to and the law gives. Such, no doubt, was the intention of the legislature.

The judgments must be considered as docketed at the

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same time, and judgment rendered that the plaintiffs Hamilton and Wing restore the money to the sheriff, and that the sheriff divide it, together with the sum of \$178.62 remaining in his hands, among all the judgments unpaid, *pro rata*. As the question is a new one, the costs of the parties should be paid out of the fund.

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SUPREME COURT.

CORDIER agt. CORDIER.

In an action for a *divorce* for alleged adulteries of the defendant, during a certain period, the plaintiff is not required to proceed by *supplemental complaint*, but may commence a *second action* demanding the same relief for alleged adulteries with the same person, charged to have occurred *after the commencement of the first action*; and an answer of the defendant to the second action, of another action pending in the court for the same cause, is *insufficient*. (SUTHERLAND, J., *dissenting*.)

Where the *order* of the court requires the defendant to *stipulate to refer the action*, as a consideration for leave to answer, it is *erroneous*. The defendant has a right to have any defence on the merits to such an action tried in the usual manner.

New York General Term, December, 1863.

SUTHERLAND, LEONARD and BARNARD, *Justices.*

ACTION for divorce by reason of alleged adulteries.

The defendant answered another action pending in this court for the same cause. On motion, this answer was stricken out, as sham and irrelevant, by order entered July 22, 1863. An appeal from this order was taken to the general term.

LOWERY & FRANSIOLI, for plaintiff.

BRAINARD & RICE, for defendant.

LEONARD, Justice. It is insisted that no former action was pending for the same cause when the present action was commenced, because the particular events charged

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were not in all respects identical. The only difference in fact is the time when the adulteries are charged to have been committed. In each case the adultery is alleged to have been committed with the same person, and the relief sought is a divorce.

At the hearing I was inclined to consider the answer sufficient; but, on further consideration, I have arrived at a different conclusion.

The case comes within that class in which the defendant is entitled, on motion, to an order staying the plaintiff's proceedings in one action, until the other (at the election of the plaintiff as to the one in which he will proceed) shall be tried. (*Clark agt. The Metropolitan Bank*, 5 *Sandf.* 665.)

The adulteries charged in the latter action occurred after the commencement of the former. I entertain no doubt that a new cause of action is stated in the second complaint. Although the plaintiff might have proceeded by supplemental complaint in the former action, that practice was not compulsory, and the plaintiff might, as he has done, resort to a new action.

The order appealed from is wrong, I think, in requiring the defendant to stipulate to refer the action as a consideration for leave to answer.

If the defendant has any defence upon the merits, she should not be deprived of a trial in the usual manner.

The order should be modified so as to permit the defendant to answer in ten days, and, in consideration of her sex, without costs.

BARNARD, J., concurred.

SUTHERLAND, P. J., dissenting. The general rule is: "*Nemo debet bis vexari pro eadem causa.*" (*Kitchen and others agt. Campbell*, 3 *Wilson*, 308; *Miller agt. Manice*, 6 *Hill*, 129.)

In *Kitchen agt. Campbell* it is said: "What is meant by

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the same cause of action is, where the same evidence will support both of the actions, although the actions may happen to be grounded on different writs. This is the test to know whether a final determination in a former action is a bar or not to a subsequent action."

This test is referred to and approved in the case in 6th *Hill* (*supra.*) (See also *Price* agt. *King*, 7 *John.* 20; *Johnson* agt. *Smith*, 8 *John.* 383.)

The counsel for plaintiff refers to these cases in his points, and concedes the test; but he says that it is, of course, apparent that evidence which must be produced to support (this) the second action, would be wholly inadmissible in this first action. To me it is plain, from the complaints in the two actions, that the plaintiff would have a right to prove, in the second action, all the acts of adultery that he would have a right to prove in the first. In other words, that the same evidence would entitle him to a divorce in either action.

The complaint in the first action (which was probably commenced about the 6th of February, 1861, for the summons is dated on that day) alleges that the defendant, on the 26th, 27th, 28th and 29th days of June, 1860, at the city of New York, did commit adultery, etc., with a certain individual (naming him), and hath since lived with the said individual as his wife. The complaint in the second action alleges that the defendant has committed adultery and has had carnal connection with the same individual (naming him), and that "she has been, for several years last past, and now is, living in the city of New York, in a continuing state of adultery with him, to whom she alleges she has been actually married, and that she has had several children by him." The complaint in the second action appears to have been verified on the 30th of May, 1863, and the action was probably commenced on or about that day.

Now, cannot the plaintiff, to prove this allegation in the

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complaint in the second action, give evidence of the acts of adultery, and of the continuous adulterous intercourse charged in the complaint in the first action; and if he can, would he not be entitled to a judgment of divorce in either action, on the same evidence?

It is true that the complaint in the second action contains the further allegation "that the defendant, at divers places within the state of New York, and at various times within two years last past, but at what particular times and places the plaintiff does not know, and is unable to state, has committed adultery," etc., with the same individual previously named; but this allegation is not important on the question we are considering, for without giving any evidence of it, the plaintiff could obtain a divorce in the second action, by proving the acts of adultery and continuing state of adultery charged in the complaint in the first action under the first allegation in the complaint in the second action of adultery, and of a continuing state of adultery for several years last past. The general charge of adultery and of a continuing state of adultery for the indefinite period of time implied by the words several years last past, would certainly permit evidence in the second action of the adultery and continuing adulterous intercourse alleged in the complaint in the first action.

But this is taking a very limited view of the question, as to the truth of the defendant's answer in the second action, that there was a prior action for the same cause of action then pending in this court; for it is plain to me if the complaint in the second action was limited in its allegations of adultery to the acts of adultery alleged to have been committed within two years last past, or, in other words, if the complaint alleged only acts of adultery committed since the commencement of the first action, that still the answer of a prior action pending would be true, because the plaintiff by the complaint in the second action

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asks for the same relief that he does by his complaint in the first action, and no other or further relief.

I understand the rule in the court of chancery to be that the plea of a prior suit pending can be pleaded when all the relief sought in the second action is attainable in the first. (*1 Barb. Ch. Pr.* 125, 126; *Law* agt. *Rigby*, *3 Bro. Ch. Ca.* 60; *Pickford* agt. *Hunter*, *5 Sim.* 122; *Story Eq. Pl.* § 337.)

It is new doctrine to me that a plaintiff, commencing an action at law or in equity to-day for certain relief, has a right to commence another to-morrow or next day, in the same court, for the same relief, because to-morrow or next day furnishes him with new or additional evidence, or grounds for the relief.

It would be difficult, I think, to find an authority showing that a plaintiff has a right thus to split up his evidence and bring different actions for the same relief.

If the plaintiff had a right to bring the second action because the adulterous intercourse charged in the complaint in the first action continued after the commencement of that action, I do not see, if the allegations of the second complaint are true, why he had not a right to commence an action for divorce regularly every morning for several years, and have them all pending at the same time in the same court.

It seems that the plaintiff would not have had a right, even by supplemental complaint or bill, to set up the acts of adultery which occurred, or the adulterous intercourse which continued after the commencement of the first action, for such new acts of adultery or continued adulterous intercourse would not have varied the relief to which he was entitled under his first complaint. (*Hasbrouck* agt. *Shuster*, *4 Barb.* 285; *Adams* agt. *Dawding*, *2 Mad.* 59; *Milne* agt. *Harewood*, *17 Ves.* 144.)

It was not for the plaintiff, on his motion to strike out

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the defendant's answer, setting up the prior action pending, to take the ground that he was not an inhabitant of this state when the first action was commenced, and, therefore, the court had not jurisdiction of the action. If that was so, and if, for that reason, he could not obtain the relief asked for in that action, he should have paid the defendant's costs in the action, and discontinued it before commencing the second action.

I do not see the pertinency of the case in 5 *Sandf.*, referred to by brother LEONARD, in his opinion. Surely the plaintiff cannot have more than one divorce from the defendant for adultery. Surely he is not entitled to several judgments of divorce for different acts of adultery as penalties for the different acts.

In another view, I think the order appealed from should not have been made.

The answer certainly was not irrelevant, and whether it was sham or not was rather a question of law than of fact. When that is the case, it appears to me that an answer should not be struck out summarily on motion as sham.

I think the order appealed from should be reversed, with costs.

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NEW YORK SUPERIOR COURT.

JOHN McDONOUGH agt. MARGARET McDONOUGH.

Alimony, whether in an action for divorce or for a separation, cannot be claimed as a matter of *right*. It is wholly discretionary with the court.

Where the wife has a judgment of the court in her favor against her husband for a separation from bed and board forever, and in which judgment the court made an allowance to her of a sum in gross, and declared that it should be in *full satisfaction for her support and of all alimony whatsoever*, such judgment is a *bar to the claim for alimony* by the wife in a subsequent action for divorce brought by her husband against her for adultery, although she claims *affirmative relief* in her defense, charging adultery against her husband.

But such judgment does not preclude her from obtaining a *counsel fee* to assist her in defending the suit for divorce. And she may, upon *restitution* of the original sum allowed her in gross, renew her motion for temporary alimony, and also for a further counsel fee.

Special Term, June, 1863.

THIS is an application for a counsel fee to the defendant's attorney to aid her in defending the action, and for temporary alimony.

The defendant in her answer not only denies the charge of adultery, but alleges the commission of adultery by the plaintiff, and asks for affirmative relief.

MONELL, Justice. Ordinarily, under these circumstances, the defendant would be entitled to both an allowance to enable her to conduct her defense, and to a reasonable support pending the suit.

But it is objected that she is not entitled to alimony by reason of the judgment of a court of concurrent and competent jurisdiction, which operates as a bar.

Prior to June, 1860, the present defendant prosecuted an action in the court of common pleas of this county, against the present plaintiff, for a limited divorce, on the ground of cruel and inhuman treatment. By the judgment in that action, entered in June, 1860, the parties were separated from bed and board forever. That judgment further ordered that the defendant therein should pay to the plaintiff therein the sum of one hundred dollars "in full

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satisfaction for her support and maintenance, and of all alimony whatsoever."

It appears by the affidavits read in opposition to this motion, that the allowance for alimony thus made was paid, and that the parties have lived separately since.

I think it is clear that the defendant cannot make any claim against her husband for support while that judgment remains in force, unless the new state of facts has deprived the judgment of its effect. The judgment being unreversed, I must hold that it was competent for the court to make an allowance in gross, and to declare, in connection with a judgment of separation, that it should be in full satisfaction for her support and of all alimony whatsoever.

If, then, this judgment, to which she was not only a party, but which was procured upon her application, deprives her of the right, as I think it does, to claim to be supported by her husband, does the fact that he is now seeking to annul the marriage contract, and that she has retorted upon him, entitle her to alimony?

Alimony, whether in an action for a divorce or for a separation, cannot be claimed as a *right*. It is wholly discretionary with the court. (*Jones agt. Jones, 2 Barb. S. C. 146.*) And where the parties have agreed to live apart, and provision has been made by the husband for the support of the wife—whether adequate or not is immaterial—the wife has no longer any claim upon her husband.

In this case the defendant stands in no better attitude, certainly, than if she was plaintiff. She seeks to obtain the same relief, and, upon competent proof, will be entitled to the same relief as if she was the prosecutrix in the action. Could she, then, if plaintiff, with a judgment in force absolving her husband from all future liability for her support, obtain alimony in the action? I think not. If, being his wife, but lawfully separated from him, she had no claim for maintenance, would the fact that she sought for and might be divorced from the chains of matrimony,

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whereby she would cease to be his wife, revive or establish her claim to support? I cannot discover any principle upon which it would. Nor are her rights enlarged by reason of her being the defendant in the action. Her support has been provided for in an unrevoked judgment; whether sufficiently, it is not for me to inquire; and it seems to me that the defendant, after having received the amount awarded to her, cannot, without making restitution, appeal to the favor of the court for a further allowance. (*Rose agt. Rose*, 11 *Paige*, 166.)

This view, however, does not deprive the defendant of the right to a reasonable allowance to enable her to conduct her defence to the plaintiff's action. This amount must be determined in reference to the pecuniary means of the plaintiff. The proofs before me do not disclose that he has anything more than suffices for the support of himself and son, who is dependent upon him; but as he has called his wife into court, and as she has a right to defend herself against the attack, and is without means to employ counsel, he must pay her twenty-five dollars.

The defendant is at liberty, upon making restitution of what she has received, or offering to, to renew her motion for temporary alimony, and also for a further counsel fee.

SUPREME COURT.

THE PEOPLE *ex rel.* ISAAC GOULD agt. JOSEPH CROSIER and others, comm'rs of highways of the town of Hebron.

Proceedings by *referees to lay out a highway* are null and void, where they do not give the *notice* required by statute to the occupants of the land through which it is to run.

And where it appears from the moving papers that the occupants of the land *waived such notice*, the *waiver may be retracted in the opposing papers*, where the consent has not been acted upon.

The *referees* may commence anew regular proceedings in such case, notwithstanding their void proceedings.

People ex rel. Gould agt. Crozier.

Washington Special Term, 1863.

An application was made for a *mandamus* requiring the commissioners to lay out a certain highway in conformity to the report of referees appointed under the statute by the county court.

BURDICK & BETTS and C. L. ALLEN, *for the relator.*

TIMOTHY CRONIN, *for the commissioners, citing People agt. Commissioners (27 Barb. 94); and People agt. Goodwin (1 Seld. 568).*

ROSEKRANS, Justice. The proceedings for the laying out or altering the highway may be regarded as regular down to and including the order of the referees reversing the order of the commissioners. But it seems that the referees proceeded to lay out the highway without giving notice to the occupants of the land through which it ran, as required by statute.

The waiver by the occupants, contained in the moving papers, is retracted by them in the papers in opposition to the motion, and no action having been had on the waiver before it was withdrawn, the withdrawal of such waiver was in time. Of course the order of the referees laying out the road, and all subsequent proceedings, are null and void, and the commissioners cannot be compelled to ascertain the damages to the occupants of the land, or to open the highway as ordered by the referees. The referees should proceed to give the notice to the occupants of the land, and lay out the highway, and make and file a survey of it.

The proceedings for that purpose, already had, being null and void, are to be disregarded, and the duty devolved upon the referees to that extent is unperformed.

The motion for a *mandamus* is denied, with \$10 costs, and the referees are ordered to proceed and discharge their duty, by giving notice to the occupants of the land, and

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laying out the road, and making and filing a survey as directed by the statute.

On appeal to the general term of the fourth district, the order of the special term was affirmed.

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NEW YORK COMMON PLEAS.

JAMES KENNEDY, appellant agt. **DAVID EILAN** and others, respondents.

A master of a vessel, although not the owner, may maintain an action in his own name to recover for the freight earned by her.

General Term, December, 1863.

DALY, BRADY and HILTON, Judges.

APPEAL from judgment of special term dismissing the plaintiff's complaint.

JAMES W. GERARD, Jr., for plaintiff.

ADOLPH M. PETSHAW, for defendants.

By the court, **DALY, F. J.** The judge below dismissed the case upon the ground that the master, not being the owner of the vessel, could not maintain an action in his own name to recover for the freight. In this he erred.

In *Clarkson agt. Edes* (4 Cow. 476), Justice WOODWORTH stated that an action for the freight may be sustained in the name of the master, on the bills of lading, for the benefit of the owners and possessors of the vessel.

In *Shields agt. Davis* (6 Taunt. 65), the objection was taken that the master who brought an action in his own name to recover freight was not the owner of the vessel. It was objected that in the declaration he averred that the goods were carried in his vessel, and, as the evidence showed, that he was merely the master and not the owner,

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that the variance was fatal. But the court said that the master had a special property in the ship, because he had necessarily the control of it, and that the action was properly brought in his name.

In *Ward* agt. *Felton* (1 *East*, 507), the master, who was not the owner, brought an action in his own name for the freight, and in the elaborate discussion which the case underwent the general right of the master to maintain such an action was not questioned either by counsel or by the court.

The master has a special interest in the freight. He may hypothecate it. ("The *Gratitudine*," vol. 3, *Chr. Robinson Ad. R.* 196.) He has a lien upon it for any responsibility necessarily incurred on behalf of the vessel in a foreign port, which, after notice, he may enforce against the consignee, even though the latter may have paid the freight to the owner. (*Gardner* agt. *The ship New Jersey*, 1 *Peters' Adm. Decisions*, 227; *Van Bokkelin* agt. *Ingersoll*, 5 *Wend.* 315; *id.* 7 *Cow.* 670; *The Am. Ins. Co.* agt. *Coster*, 3 *Paige Ch. R.* 323.) As the general agent of the owner, in respect to the vessel and the voyage, he is authorized to collect it, and when collected he has the right as against the owner to retain it for his wages or advances (*Van Bokkelin* agt. *Ingersoll*, *supra*); and as master he has a lien upon the cargo while it remains in his hands, and may retain it until the freight is paid. (2 *Brown's Civil and Admiralty Law*, 82.) These rights and powers bring him within that class of persons who, having a special interest in the subject matter or thing, may always sue for it in their own name. (*White* agt. *Chouteau*, 10 *Barb.* 202.)

He is enumerated among this class in Brown's excellent treatise upon Actions at Law, page 162, who says: "A captain of a ship for freight may sue in his own name to enforce a contract entered into by him as agent, as he has an interest in the contract."

Without pursuing the subject further, it is sufficient,

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upon these authorities, to say that the master in his character as such may maintain an action in his own name to recover for the freight.

The judgment should be reversed, with costs.

NEW YORK SUPERIOR COURT.

MARIA ANDERSON agt. PATRICK DICKIE.

After a judgment entered *absolutely*, a motion for a new trial on a case or exceptions cannot be heard at *special term*.

If the judgment is to be reviewed on appeal at general term on a case or exceptions, the appellant must procure an *order of the court* authorizing the case or exceptions to be annexed to and to form part of the *judgment roll*.

Until this is done, the respondent has a right to notice the cause for argument and put it on the calendar of the general term, *before the expiration of the time for filing the case or exceptions*, after settlement.

Heard at General Term, June, 1863, before ROBERTSON, WHITE and BARBOUR, Justices; decided December 26, 1863.

THIS was a motion made by the defendant to strike this case from the general term calendar, on the ground that it was not properly on. The facts are fully stated in the opinion of the court.

Ira D. Warren, *for plaintiff.*

A. Boardman, *for defendant.*

ROBERTSON, Justice. This is a motion to strike the cause from the calendar of the general term, upon the ground that it was placed there, and notice of trial given, before the time for filing the case containing exceptions as settled had elapsed.

The case was resettled on the 20th of May, 1863; judgment had been entered on the verdict for the plaintiff, and the judgment roll filed on the 28th of February previous. The case was served on the 30th of March last, and also a notice of appeal from the judgment. Amendments were

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proposed to such case on the 2d of April last. The case was originally settled on the 2d of May, and notice of argument served by the plaintiff for the present term on the 4th of May last. Notice of resettlement was given on the 9th of May last. After the 20th of May a new notice of argument was served by the plaintiff, and also a notice that he would receive his copies of the case as late as the 29th of May last. Such notices of argument never were returned; no order ever was obtained allowing the judgment to be entered to stand as security; consequently it was absolutely entered, no motion having been made for a new trial at special term on a case or exceptions.

The Code requires (§ 265) that all motions for a new trial on a case or exceptions must be heard in the first instance at special term, except when exceptions are directed to be heard in the first instance at general term. Rule 33 of the courts of this state also requires motions for a new trial to be made in the first instance at special term; otherwise both parties must be deemed to have acquiesced in the decision of the judge or referee, and the verdict of the jury, or the report of the referee upon questions of fact. Section 281 of the Code provides that exceptions or a case are to constitute part of the judgment roll. General rule 37 provides that a case or exceptions shall be filed by the party making them within ten days after their settlement. After a judgment entered absolutely, a motion for a new trial upon a case or exceptions cannot be heard at special term. There is no general provision by law that a case or exceptions, when filed after filing the judgment roll, may be annexed as a matter of course to the judgment roll for the purpose of review. It must in such case be done by special order. (*Lynde agt. Cowenhoven*, 4 *How. R.* 327; *S. C. 3 Code R.* 7; *Renouil agt. Harris*, 7 *How. R.* 273; *S. C. 2 Sandf. R.* 64; 1 *Code R.* 226; *Church agt. Rhodes*, 6 *How. R.* 285.) No such order seems to have been obtained in this case. A case or exceptions cannot

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therefore form part of the papers on an appeal, unless filed before the judgment roll ; a motion upon them for a new trial has been made and denied, or they are ordered by the court to be inserted in the judgment roll ; nor can exceptions taken to the decision of the court on a trial without a jury, or the report of a referee, unless taken after it is made, which must necessarily succeed the giving of judgment.

The judgment in this case was entered absolutely, and no motion for a new trial could therefore be made at special term on a case. If the judgment at special term be allowed to be reviewed, it can only be on a case or exceptions inserted in the record, for which insertion no order has been obtained. Without such order the defendant could only have the judgment reversed for errors appearing in the judgment roll as it stands (*Hunt agt. Bloomer*, 3 *Kern. R.* 341 ; *S. C.* 12 *How.* 567), without either case or exceptions. The plaintiff had a right to assume that it was not necessary for him, in order to be entitled to notice his cause for argument, to wait the filing of a case or exceptions which could not be used on the argument unless an order was obtained inserting it or them in the judgment roll. If such order had been obtained, the defendant had a right to his ten days to prepare and file the case to be served, and the plaintiff's remedy for an omission would be under rule 37 ; not having obtained it, the plaintiff was entitled to assume the defendant did not intend to do so, and to notice his case for argument. When the case may be brought on for hearing, it may be a good cause for postponing it, in case such order be obtained, that being entitled to ten days to prepare the case or exceptions, such time did not expire soon enough to enable the defendant to have the eight days of the notice of argument in which to prepare for the argument of the case.

As the case at present stands, I think the motion should be denied, with seven dollars costs to the plaintiff to abide the event of the appeal.

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COURT OF APPEALS.

MOSES LOWENBERG, plaintiff in error agt. **THE PEOPLE OF THE STATE OF NEW YORK**, defendants in error.

Where the term of the *court of general sessions* for the city and county of New York is continued beyond the time prescribed by statute (2 R. S. 217, § 31), by reason of the *unfinished trial of a case*, commenced during the regular term—which continuation is provided for by a statute of 1846 (*Laws of 1846*, p. 4)—any prisoners convicted during the term *may be legally sentenced* by the court during its session for such unfinished trial.

The provision of the Revised Statutes which required that the warrant for the execution of the *sentence of death*, made out by the court, should *appoint the day* on which such sentence should be executed, was repealed by the act of April 14, 1860.

Where the court, in passing sentence of death under the act of 1860, also *fix the day for the execution* of the prisoner after the expiration of one year from the date of his sentence—making his confinement in the state prison at hard labor more than *thirteen and a half months*—although an *error of the court*, is not such an error as *entirely vitiates the sentence*, requiring a reversal of the judgment. (BALCOM, J., dissenting.)

It seems, that the act of 1860 affirms the common law right to execute persons convicted of murder in the first degree, by hanging, notwithstanding that act declares that such person “ shall be punished as herein provided,” but makes no provision for the mode of execution.

Where a *juror*, on a trial for murder, was *challenged* for principal cause, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, and it was established that he had *formed an opinion* “ that the prisoner killed Hoffman” (the deceased), which he had never expressed:

Held, that this was not an opinion as to the *guilt or innocence* of the prisoner, as the prisoner might have killed Hoffman innocently.

Argued June Term, 1863 ; decided October, 1863.

THE term of the court of general sessions, at which the prisoner was tried and sentenced, was commenced on Monday the second day of December, 1861, and was continued until the fourth day of January, 1862, when the sentence was pronounced. The prisoner was tried and found guilty by the jury on the 11th day of December, 1861. The trial of one Jeffords was commenced in that court on the 18th day of that month, and was concluded by a verdict of guilty on the 24th day of the same month. On the 28th day of that month the district attorney moved

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that judgment be pronounced upon the prisoner and Jeffords. But the pronouncing of judgment in each case was postponed, at the request of the counsel for the prisoner, until the 4th day of January, 1862.

H. L. CLINTON, *for plaintiff in error.*

N. J. WATERBURY, *for defendants in error.*

BALCOM, J. The prisoner's counsel now insists that the court of general sessions was unlawfully continued, as to the prisoner, beyond the third week in December, 1861. The law fixing the terms of that court, until the year 1846, was, that the same should commence on the first Monday of every month, and might continue and be held until and including Saturday in the third week thereafter. (2 R. S. 217, § 31.) But, by chapter two of the Laws of 1846, it was provided that whenever the trial of a cause shall have been commenced in that court, "and the same shall not be concluded before the expiration of the term of said court, it shall be lawful for the said court to continue in session until the conclusion of said trial, and to proceed to judgment, if they shall so deem necessary, in cases where convictions shall be had." (*Laws of 1846*, p. 4.) The trial of Jeffords had been commenced and was not concluded until the term prescribed by the statute, prior to 1846, had expired. The court therefore was lawfully continued in session until the fourth day of January, 1862, which was two days before the first day of the January term in that year. And there can be no doubt but that it was lawful for the court to sentence Jeffords on the 4th day of January, 1862; and I am of the opinion it was also lawful for the court to proceed to judgment against the prisoner in this case, on that day. The court then was legally in session, and was authorized to proceed to judgment in cases where convictions were had. It was not restricted to proceeding to judgment in the case on trial at the expiration

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of the December term. The language of the statute is too broad and comprehensive to admit of such a restricted construction. It is, that the court may "proceed to judgment, if they shall so deem necessary in cases where convictions shall be had." This authorized the court to pronounce judgment upon any number of prisoners at any time before its final adjournment; for the term was lawfully continued, because the trial of Jeffords was not concluded when it would have expired, if no cause had then been on trial.

It must be presumed that the authors of the law of 1846 knew what every lawyer then knew, to wit, that prisoners were seldom sentenced at the time they were found guilty by the jury, but generally at the close of the term, after all the cases ready for trial had been disposed of. Sentence was sometimes delayed to enable counsel to prepare and engross exceptions, and for other reasons; and during such delays other cases were taken up and tried: and having this knowledge, the legislature would have used different language if the intention had been to restrict the court to pronouncing judgment, after the expiration of the regular term, to the single case on trial when such term expired. It is certain that the court lawfully continued its sittings beyond the third week in December, 1861, if chapter 208 of the laws of 1859 (*Laws of 1859*, p. 465) is applicable to it. That act provides that it shall be lawful for "the court of sessions of any county of this state" to continue its sittings at any term thereof so long as it may be necessary, in the opinion of such court, for the dispatch of any business or the determination of any cases that may be pending before such court. The court of general sessions of the peace in and for the city and county of New York is but a court of sessions for the county of New York, and is designated in the act of 1859 by the words "the court of sessions of any county of this state." A court of general sessions of the peace and a court of sessions of any

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county are one and the same tribunal. It is the criminal court of the county, whether held by the same or different magistrates. (See *People agt. Powell*, 14 Abb. R. 91.) I am therefore of opinion that the act of 1859 authorized the court of general sessions of the city and county of New York to continue in session until it passed sentence upon the prisoner in this case.

The prisoner was convicted of murder in the first degree, and sentenced under the act of April 14, 1860, entitled "An act in relation to capital punishment and to provide for the more certain punishment of the crime of murder." (*Laws of 1860*, p. 712.) The crime was committed after that act took effect. But the prisoner's counsel contends that that act abolished all punishment for murder "of the first degree." Section one was as follows: "No crime hereafter committed, except treason and murder in the first degree, shall be punished with death in the state of New York." By section four it was provided: "Where any person shall be convicted of any crime punishable with death, and sentenced to suffer such punishment, he shall at the same time be sentenced to confinement at hard labor in the state prison until such punishment of death shall be inflicted." Section five declared that "no person so sentenced or imprisoned shall be executed in pursuance of such sentence within one year from the day on which such sentence of death shall be passed, nor until the whole record of the proceedings shall be certified by the clerk of the court in which the conviction was had, under the seal thereof, to the governor of the state, nor until a warrant shall be issued by the governor, under the great seal of the state, directed to the sheriff of the county in which the state prison may be situated, commanding the said sentence of death to be carried into execution." That act expressly repealed section 25 of that portion of the Revised Statutes entitled "Of crimes punishable with death," which declared that the punishment of death shall in all cases be

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inflicted by hanging the convict by the neck until he be dead. (See 2 R. S. 659, § 25.) And it amended section one of the same portion of the Revised Statutes so as to read as follows: "Every person who shall hereafter be convicted, first, of treason against the people of this state, or, second, of murder, or, third, of arson in the first degree, as those crimes are respectively declared in this title, shall be punished as herein provided." Provision was made in section 18 of the act of 1860 for the execution of persons, by virtue of the warrant of the governor, who should become insane after being convicted of murder in the first degree, provided they should subsequently become sane. Punishment with death was recognized by section 19 of the same act. And I am of the opinion the Revised Statutes above mentioned, which stated that the warrant for the execution of the sentence of death, made out by the court, should appoint the day on which such sentence should be executed, was repealed by the act of 1860, which provided for the fixing of the time of execution, if ever, by the governor. The designation of the time for executing the sentence by the governor was entirely inconsistent with the appointment of such time in the warrant for the execution of the sentence made out by the court. Hence, conferring authority upon the governor to fix the day for executing the sentence necessarily took away the authority before vested in the court to appoint such day.

It seems to me that the act of 1860 clearly affirms the common law right to execute persons convicted of murder in the first degree. It nowhere professes to abolish the penalty of death for that crime; and the right to inflict it is recognized in several different sections. The fact that the act so amended a section of the Revised Statutes above quoted, as to declare that persons convicted of murder should be punished as therein provided, and that the section prescribing the mode of taking the lives of persons so convicted was expressly repealed, does not make the com-

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mon law mode of inflicting the death penalty inapplicable to cases where that punishment is recognized by such act or the Revised Statutes as amended by that act. The words, "shall be punished as herein provided," in the act of 1860, were applicable so far as that act prescribed the extent and mode of punishment, but no farther. And if the authors of such act intended, by the repeal of the statute declaring that the punishment of death should in all cases be inflicted by hanging the convict by the neck, so to alter the law as to make it impossible ever to inflict the punishment of death upon a murderer, they did not go far enough to make such intention effectual: for they stopped short of abrogating the common law by which the mode of executing murderers had become fixed and certain. That mode was by hanging the convict by the neck until he was dead, unless he was a slave. This is shown in a very learned opinion delivered by Justice CAMPBELL in the *People agt. Doane* (MS. but soon to be published.)

The prisoner's counsel challenged Durant as a juror, for principal cause, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner. But the most that was established against his competency was, that he had formed an opinion that the prisoner killed Hoffman, which he had never expressed. This was not an opinion as to the guilt or innocence of the prisoner. He might have killed Hoffman, and still been innocent of any criminal offence. The court therefore properly overruled the challenge to Durant for principal cause, and as he was not challenged for favor, there was no error in permitting him to sit as a juror in the case. The rule respecting such challenges was correctly stated by BEARDSLEY, J., in *Freeman agt. The People* (4 Denio, 33). He there said: "Every challenge for principal cause must be for some matter which imports absolute bias or favor, and leaves nothing for the discretion of the court. The truth of the fact alleged, and that alone, is in question;

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its sufficiency as a ground of challenge is conceded by omitting to demur or taking issue on the fact. It is otherwise on a challenge for favor. That must be determined by triers, who are to pass upon the question of actual bias or favor." Within this rule the ground of challenge to Durant was not proved. Before it could be said it was established, the proof must have been that he had formed and expressed an opinion as to the *guilt or innocence* of the prisoner, or at least that he had formed such an opinion. It is clear that the forming of an opinion that the prisoner had done an act necessary to be shown, among others, in order to convict him, was not the forming of an opinion that he was guilty of murder or of any other crime.

The foregoing views lead to the conclusion that the prisoner was lawfully convicted of murder in the first degree. But I am of the opinion the court of sessions erred in adjudging that the prisoner should suffer death on a particular day. The day on which he should be executed, if ever, should have been left for the governor to designate; the proper sentence would have been, that the prisoner suffer death for the crime of murder in the first degree, in killing Samuel Hoffman, at the city of New York, on the 14th day of November, 1861, whereof he has been duly convicted, by being hung by the neck until he be dead, by the sheriff of the county in which he shall be imprisoned, at such place and time after the expiration of one year from the date of his sentence as such sheriff shall be commanded by a warrant issued by the governor under the great seal of the state, and that he be confined in the state prison at hard labor until such punishment of death shall be inflicted.

The court fixed a day for the execution of the prisoner, so he was to be confined in the state prison at hard labor more than thirteen and a half months before he could be executed; when, by the act of 1860, he could be so confined only one year, if the governor should so determine

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and issue a warrant for his execution. The supreme court could not lawfully affirm this judgment. Its duty was to reverse it. When the case was before that court the statute was as follows: "If the supreme court shall reverse the judgment rendered, it shall direct a new trial, or that the defendant be absolutely discharged, according to the circumstances of the case." (2 R. S. 741, § 24.) The act of 1863 (*Laws of 1863*, p. 406), amending this section, was passed after the judgment was pronounced, and therefore *ex post facto* as to this case, and cannot influence our decision in it. We must therefore determine whether, according to the common law, the supreme court should have directed a new trial, or that the defendant be absolutely discharged, according to the circumstances of the case.

In the *King agt. Ellis* (5 *Barn. & Cress.* 395), the prisoner was sentenced to be transported for fourteen years, when, according to law, he could only be transported for seven years; and the court of King's Bench reversed the judgment and discharged the prisoner, holding that there was no ground to send it back to be amended. In the *King agt. Bourne and others* (7 *Adol. & Ellis*, 58), it was held, where an erroneous judgment is given by an inferior court on a valid indictment (as by passing sentence of transportation in a case punishable only with death), and the defendant brings error, the appellate court can neither pass the proper sentence nor send back the record to the court below in order that they may do so; but the judgment must be reversed and the defendant discharged. In *Shepard agt. The Commonwealth* (2 *Metcalf*, 419), the prisoner was sentenced to be imprisoned four years, when the limit was three, and the supreme court of Massachusetts reversed the judgment and discharged him. And that court subsequently, in *Christian agt. The Commonwealth* (5 *Metcalf*, 530), laid down the following rules, namely: "When a judgment in a criminal case is entire, and a writ of error is brought to reverse it, though it is erroneous in

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part only, it must be wholly reversed. The court, after reversing a judgment in a criminal case, cannot enter such judgment as the court below ought to have entered, nor remit the case to the court below for a new judgment." These rules were approved by BRONSON, Ch. J., in *The People agt. Taylor* (3 Denio, 91).

My conclusion is: as the only error the court of sessions committed was in giving a wrong judgment in part against the prisoner, no new trial can be legally granted, and that the judgment must be wholly reversed, and the prisoner discharged.

I regret that I am forced to this conclusion, for it is quite clear that the prisoner is guilty, and will escape just punishment. But this result cannot be avoided; for it is for the legislature, and not the courts, to alter the laws in order to prevent the guilty escaping the punishment they deserve.

WRIGHT, J., read an opinion for reversing the judgment and discharging the prisoner, on the ground that there was no punishment for murder in the first degree committed while the act of 1860 was in force. EMOTT, J., concurred in this opinion.

DENIO, Ch. J., DAVIES, SELDEN, MARVIN and ROSEKRANS, JJ., voted for affirming the judgment pronounced upon the prisoner. They agreed with Judge BALCOM that the court of sessions erred in sentencing the prisoner to suffer death on a particular day, but held that such error did not entirely vitiate the sentence.

Judgment affirmed.*

[No written opinions were delivered in the case, except by WRIGHT and BALCOM, JJ.]

* For a convenient reference, we give below the provisions of the Revised Statutes (2 R. S. 656, Part 4, Chap. 1, Title 1), "Of crimes punishable with death," as amended by the act of April 14, 1860, entitled "An act in relation to capital punishment, and to provide for the more certain punishment of the crime of murder," and also the act of 1860; so that the two statutes may be read together as they now stand:

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Revised Statutes.—§ 1. Every person who shall hereafter be convicted, first, of treason against the people of this state; or second, of murder; or third, of arson in the first degree, as those crimes are respectively declared in this title, *shall be punished as herein provided.* § 2. The following acts shall constitute treason against the people of this state: 1. Levying war against the people of this state, within the state: or 2. A combination of two or more persons by force, to usurp the government of the state, or to overturn the same, evidenced by a forcible attempt made within this state to accomplish such purpose: or 3. Adhering to the enemies of this state, while separately engaged in war with a foreign enemy in the cases prescribed in the constitution of the United States, and giving to such enemies aid and comfort in this state or elsewhere. § 3. Whenever any person shall be outlawed upon a conviction for treason, the judgment thereupon shall produce a forfeiture to the people of this state, during the lifetime of such person, and no longer, of every freehold estate in real property, of which such person was seized in his own right, at the time of such treason committed, or at any time thereafter; and of all his goods and chattels. § 4. The killing of a human being, without authority of law, by poison, shooting, stabbing, or any other means, or in any other manner, is either murder, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case. § 5. Such killing, unless it be manslaughter or excusable or justifiable homicide, as hereinafter provided, shall be murder in the following cases: 1. When perpetrated from a premeditated design to effect the death of the person killed, or of any human being: 2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual: 3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony. § 6. Every inhabitant or resident of this state, who shall, by previous appointment or engagement, fight a duel, without the jurisdiction of this state, and in so doing, shall inflict a wound upon his antagonist or any other person, whereof the person thus injured shall die within this state, and every second engaged in such duel, shall be deemed guilty of murder within this state, and may be indicted, tried and convicted in the county where such death shall happen. § 7. Every person indicted under the provisions of the last section may plead a former conviction or acquittal for the same offence, in another state or country; and if such plea be admitted or established, it shall be a bar to any further or other proceeding against such person for the same offence, within this state. § 8. The killing of a master by his servant, or of a husband by his wife, shall not be deemed any other or higher offence than if committed by any other person. § 9. Arson in the first degree, the punishment of which is prescribed in this title, consists in willfully setting fire to, or burning, in the night time, a dwelling-house in which there shall be at the time some human being; and every house, prison or jail, or other edifice, which shall have been usually occupied by persons lodging therein at night, shall be deemed a dwelling-house of any person so lodging therein. § 10. But no warehouse, barn, shed or other outhouse shall be deemed a dwelling-house, or part of a dwelling-house, within the meaning of the last section, unless the same be joined to, immediately connected with, and part of a dwelling-house. § 11. Whenever any convict shall be sentenced to the punishment of death, the court, or a major part thereof, of whom the presiding judge shall always be one, shall make out, sign and deliver to the sheriff of the county, a warrant, stating such conviction and sentence, and appointing the day on which such sentence shall be executed. (*Sections 12, 13 and 14 are repealed by the act of 1860.*) § 15. No judge, court or officer, other than the governor, shall have any authority to reprieve or

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suspend the execution of any convict sentenced to the punishment of death, except sheriffs, in the cases and in the manner hereinafter provided. § 16. If, after any convict shall have been sentenced to the punishment of death, he shall become insane, the sheriff of the county, with the concurrence of a justice of the supreme court, or if he be absent from the county, with the concurrence of the county judge of the county in which the conviction was had, may summon a jury of twelve electors to inquire into such insanity, and shall give immediate notice thereof to the district attorney of the county. § 17. The district attorney shall attend such inquiry, and may produce witnesses before the jury; for which purpose he shall have the same power to issue subpoenas as for witnesses to attend a grand jury, and disobedience thereto may be punished by the court of oyer and terminer which shall next sit in such county, in the same manner as disobedience to any process issued by such court. § 18. (As amended by the act of 1860.) The inquisition of the jury shall be signed by them and the sheriff. If it be found by such inquisition that such convict is insane, the sheriff shall convey said convict to the lunatic asylum for insane convicts, there to be kept at the expense of the state until such time as the superintendent thereof shall certify to the governor that said lunatic is sane, and the governor may thereupon issue his warrant for his execution, if he was convicted of murder in the first degree, or may direct that he be imprisoned in one of the state prisons, according to law. (Sections 19, 20, 21, 22, 23, 24, 25 and 26 repealed by the act of 1860.) § 27. It shall be the duty of the sheriff or under sheriff of the county to be present at such execution, and to invite the presence, by at least three days' previous notice, of the judges, district attorney, clerk and surrogate of said county, together with two physicians and twelve reputable citizens, to be selected by said sheriff or under sheriff. And the said sheriff or under sheriff shall, at the request of the criminal, permit such minister or ministers of the gospel, not exceeding two, as said criminal shall name, and any of the immediate relatives of said criminal, to attend and be present at such execution; and also, such officers of the prison, deputies and constables as said sheriff or under sheriff shall deem expedient to have present; but no other persons than those herein mentioned shall be permitted to be present at such execution, nor shall any person under age be allowed to witness the same. § 28. The sheriff or under sheriff and judges attending such execution, shall prepare and sign officially a certificate setting forth the time and place thereof, and that such criminal was then and there executed in conformity to the sentence of the court and the provisions of this act; and shall procure to said certificate the signatures of the other public officers and persons, not relatives of the criminal, who witnessed such execution; and the sheriff or under sheriff shall cause such certificate to be filed in the office of the clerk of said county, and a copy thereof to be published in the state paper, and in one newspaper, if any is printed in said county. (Section 29 repealed by the act of 1860.)

Act of April 14, 1860.—§ 1. No crime hereafter committed, except treason, and murder in the first degree, shall be punishable with death in the state of New York. § 2. All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or the attempt to perpetrate any arson, rape, robbery or burglary, or in any attempt to escape from imprisonment, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree; and the jury before whom any person indicted for murder in either degree shall be tried, shall, if they find such person guilty thereof, find in their verdict whether it be under the first or second degree. § 3. Upon any indictment against any person for murder in the first degree, it shall and may be lawfully

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for the jury to find such accused person guilty of murder in the second degree. § 4. When any person shall be convicted of any crime punishable with death, and sentenced to suffer such punishment, he shall at the same time be sentenced to confinement at hard labor in the state prison until such punishment of death shall be inflicted. The presiding judge of the court at which such conviction shall have taken place, shall immediately thereupon transmit to the governor of the state, by mail, a statement of such conviction and sentence, with the notes of testimony taken by such judge on the trial. § 5. No person so sentenced or imprisoned shall be executed in pursuance of such sentence within one year from the day on which such sentence of death shall be passed, nor until the whole record of the proceedings shall be certified by the clerk of the court in which the conviction was had, under the seal thereof, to the governor of the state, nor until a warrant shall be issued by the governor, under the great seal of the state, directed to the sheriff of the county in which the state prison may be situated, commanding the said sentence of death to be carried into execution. § 6. Every person convicted of murder in the second degree shall be sentenced to undergo imprisonment in one of the state prisons, and be kept in confinement at hard labor for his or her natural life. (Section 7 amends § 1 of the Revised Statutes as above, and section 8 amends § 18 of the Revised Statutes as above.) § 9. The provisions of this act for the punishment of murder in the first degree shall apply to the crime of treason; and the punishment of murder in the second degree, as herein provided, shall apply to all crimes now punishable with death, except as herein provided. § 10. All persons now under sentence of death in this state, or convicted of murder and awaiting sentence, shall be punished as if convicted of murder in the first degree under this act. (Section 11 repeals sections 12, 13, 14, 19, 20, 21, 22, 23, 24, 25, 26 and 29 of the Revised Statutes, as above stated.)

SUPREME COURT.

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An allegation in a complaint, not denied by the answer, stands admitted of record. The purchase of a judgment by an attorney, for the purpose of enforcing it by execution, is not in violation of the statute which prohibits attorneys from buying choses in action with the intent and for the purpose of bringing suits thereon.

This prohibition is not limited to suits at law, but extends to actions in equity.

An agreement by an attorney, on commencing an action, that he will indemnify the client against the costs which may be recovered against him therein, is void for champerty and maintenance, notwithstanding section 308 of the Code of Procedure.

While the relation of attorney and client continues, the court will carefully scrutinise the dealings and contracts between them, and guard the client's rights against every attempt by the attorney to secure any advantage to himself at the expense of the client.

Nor is it necessary in such case for the client to show actual, or, as it is sometimes called, active fraud, in order to obtain relief; but the law will presume in his

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favor so soon as the confidential relation is shown to have existed at the time of the transaction complained of.

An attorney, who purchases the subject matter of the litigation from *his client's adversary* in the suit, will be deemed to have purchased in trust for his client at his election.

The disability of an attorney to purchase a demand against his client, as to which he has been retained and consulted, and to hold it for his own benefit, will continue *after the confidential relation has ceased*.

In such case, the attorney is entitled to hold and enforce the demand only for the sum advanced on its purchase.

These consequences result from an application of principles of *preventive injury*, which often attach to innocent transactions with the same legal effect as if the transactions were in fact unjust and fraudulent.

Saratoga Special Term, September, 1863.

THIS action was in the nature of a *scire facias*, calling on the defendant to show cause why execution should not issue on three judgments recovered against the defendant, of which the plaintiff became the assignee. Two of the judgments were for costs recovered against the defendant in actions brought by him against A. L. Linn, in which he was a defeated plaintiff. It is unnecessary to notice the third judgment, as all claim on it was withdrawn by the plaintiff on the trial.

The defendant interposed three defences: First, payment; second, statute of limitations; and third, that the plaintiff agreed, on the commencement of the actions, to indemnify and save the defendant harmless from all costs which might be recovered in the suits.

The cause was tried before the court and jury. No evidence was offered in support of the first defence; the second was not substantiated; and the jury found a verdict in favor of the plaintiff on the third. The court reserved the case for consideration, and finally ordered judgment in favor of the plaintiff. Various questions of law were raised in the action, which are considered in the opinion, in which such other facts are stated as are necessary to a proper understanding of the case.

J. BROTHERSON, *for the plaintiff.*

E. F. BULLARD, *for the defendant.*

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BOCKES, Justice. This action is brought for the purpose of enforcing three judgments against the defendant, of which the plaintiff is the assignee. A motion was first made at special term for liberty to issue executions, but various matters of defence were interposed, and the motion was denied, with liberty to bring an action.

At the trial the plaintiff abandoned all claim under the third judgment specified in the complaint, and by permission of the court withdrew it from the cause. The cause therefore stands on the two judgments entered February 3d, 1853; one for \$599.65, the other for \$145.25.

The defendant, by omitting to deny it, admits the allegation of the complaint whereby the recovery and entry of the judgments are averred. This allegation stands admitted of record. Nor is it charged in the answer that the judgments are without jurisdiction and void. The defendant is not, I think, in a position to claim that the judgments are invalid. But had he not admitted the due recovery of the judgments, the objection could not prevail. The court had jurisdiction of the parties and of the subject matter of the actions, and the entry of judgments, if irregular, was not void. They remain of record, not vacated, annulled or reversed.

The plaintiff was a practicing attorney and counsellor of this court at the time he purchased the judgments. But according to the decision in *Warren agt. Paine* (3 Barb. Ch. 630), he had a right to make the purchase for the purpose of issuing executions and collecting the debts, notwithstanding the statute prohibiting attorneys from buying choses in action with the intent and for the purpose of bringing suits thereon. As was there held, the policy of the law does not embrace such case. At one time it was supposed that this defence was not available in suits in equity where costs are in the discretion of the court. (7 *Hill*, 586.) It is, however, now well settled that it is as effectual in actions in equity as in actions at law. (2 *Barb.*

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Ch. 306; 14 Barb. 548; 9 Barb. 297.) But according to the case of *Warren* agt. *Paine*, the plaintiff was not prohibited from buying the judgments for the purpose of enforcing them by execution. In this case he applied, on motion at special term, for liberty to issue executions on the judgments, when he was met by an allegation of payment, and of other defences, which led to a denial of the motion, with liberty to bring an action on the judgments, and this suit was then instituted. This defence, however, is not here available, if for no other reason, because not set up in the answer—and in fact is not urged by the defendant's counsel.

The defences interposed by the answer to the first two judgments specified in the complaint (the third being withdrawn, hence out of the case) are, *first*, payment; *second*, statute of limitations; and *third*, that the judgment belonged in fact to the plaintiff to pay, under an agreement made between him and the defendant at the commencement of the actions, to the effect that he would indemnify the defendant against all costs that might be recovered therein.

As to the first defence of payment, no evidence whatever was offered in its support; so that defence fails.

The second defence sets up that the causes of action stated in the complaint did not, nor did either of them, accrue within twenty years before the suit was commenced. The two judgments in suit, it seems, were entered on the 3d February, 1853, less than ten years prior to the commencement of the action. Hence this defence is unsupported.

As to the third defence, the jury, on the evidence, have found a verdict in favor of the plaintiff, that no such agreement as that set up in the answer was made between the parties. The verdict therefore disposes of that defence.

It was insisted on the trial that this third alleged defence was unavailing, if the facts on which it depended were established; *first*, because covered by the arbitration be-

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fore Mr. Wait; and *second*, because the alleged agreement by the plaintiff to indemnify the defendant against costs was void for champerty and maintenance. I ruled against both propositions. My ruling is of no importance in this case, inasmuch as the jury found against the defendant; that is, against the existence of the alleged agreement.

It is but fair to the plaintiff to remark here, that he indignantly denied, on oath, that he made any such contract, and the jury declared it unproved against him. On further consideration, I am not entirely satisfied with my decision at the circuit on the two points above stated; and although unnecessary, the verdict having been in favor of the plaintiff, I propose to submit a few suggestions on those points.

In 1860, about ten years after the alleged agreement was charged to have been made, the parties submitted all their matters in difference, claims and demands to arbitration, and the plaintiff claimed for services in these suits, which claim the defendant resisted; but the plaintiff prevailed. Was not this determination of the arbitrator—this adjudication—conclusive between the parties? And in regard to champerty and maintenance: According to the *alleged* contract, the plaintiff, an attorney and counsel of this court, agreed to carry on those suits at his own expense, and indemnify the defendant against all costs. An agreement by an attorney to carry on a suit at his own expense was, before the Code, unlawful. Section 303 has modified the law of champerty. By this section the former rules and provisions of law, restricting or controlling the right of a party to agree with an attorney, solicitor or counsellor, for his compensation, is repealed; so an agreement between a party and his attorney, that he shall share in the recovery or have an interest in the subject matter of the suit, is now lawful. (23 *Barb.* 420.) In this case, however, it is intimated that a contract by an attorney to carry on the suit of his client at his own expense would

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be illegal and void. This would be maintenance in its most obnoxious sense, and is quite different from an agreement with the client for extra or unusual compensation allowed by the Code. It seems to me that a contract between an attorney and his client, that he will carry on a suit at his own expense, and indemnify the client against costs, is still subject to the just denunciation of the law, notwithstanding section 303 of the Code. Such agreement much more than simply assists a party to prosecute; it encourages him to litigate with a certainty of impunity as to the result and consequences of the suit. It is, as stated by BLACKSTONE, "an offence against public justice, as it keeps alive strife and contention, and perverts the remedial process of the law into an engine of oppression." The section alluded to gives to the parties a right to agree on the measure of the attorney's compensation, which is a different thing from a right to indemnify a party against the contingency of defeat as an inducement to enter upon the chances of litigation. If, therefore, the contract set up in the answer had been entered into in fact, it would have been void, and neither party could have derived any advantage from it. But it is unnecessary here to enter into any discussion of this question, as the jury have found that no such agreement was made.

Important questions yet remain for examination.

It is insisted that the plaintiff can recover only the amount actually paid by him on the purchase of the judgments, for the reason that he was the attorney and counsel of the defendant in the actions, and also was his counsel in efforts to defeat the judgments after they were entered, on a claim that they were invalid and void. The position is, that the purchase by the plaintiff should be deemed and held to be a purchase for the benefit of the defendant.

Against this it is first urged, that no such defence is set up in the answer. I entertained the point on the trial,

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deciding that I would permit an amendment of the answer if I should determine that it had foundation in law.

It appears that these actions terminated in judgments against the defendant, entered February 3d, 1853; but the plaintiff continued to be his general attorney and counsel until 1860, when all confidential business and social relations ceased between them. Two years after, the plaintiff became the purchaser of the judgments. At this time he was not the attorney, counsel or agent of the defendant, either as regards those judgments or as to any other suit, matter or thing whatsoever; nor did he owe the defendant any duty, unless some obligation or restriction remained, growing out of their former confidential relation.

While the relation of attorney and client continues, the court will carefully scrutinize the dealings and contracts between them, and guard the client's rights against every attempt by the attorney to secure an advantage to himself at the expense of the client. Nor is it necessary in such case for the client to show actual, or, as it is sometimes called, active, fraud, in order to obtain relief; but the law will presume in his favor, so soon as the confidential relation is shown to have existed at the time of the transaction complained of. This rule has its foundation on principles of public policy, and is adhered to by the courts with the utmost rigor. (*Story's Eq. Jur.* sec. 308 to 324; 9 *John.* 253; 5 *Denio*, 640; 1 *John. Ch.* 344; 11 *Paige*, 538; 3 *Cow.* 527; 13 *Barb.* 524; 31 *Barb.* 9; 7 *Simons*, 539; 27 *Eng. Law & Eq.* 100; 16 *N. Y.* 285; 6 *N. Y.* 268, 272.) Several of these cases were between principals and their agents, but the rule is the same in all cases whenever a confidential relation is shown to exist between parties. In this case, however, the purchase of the judgments was not made *from the client*. No contract was made *with him*. All business relations, indeed all social relations, had ceased between them long prior to the purchase. *He* was not led into any improvident contract, sale or arrangement with

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the plaintiff by reason of any fraud or imposition, or by the exercise of any undue influence growing out of their relations or otherwise.

But if an attorney purchase the subject matter in litigation from his client's adversary in the suit, or any interest therein, his client will be entitled to the advantages growing out of the purchase at his election—the attorney will be held to be the agent of his client for the purpose of effecting the purchase, if the client chooses to hold him to that position. His agreement with the client under the retainer is to the effect that he will use his faculties and powers for the advantage of his client in regard to the matters of the litigation; and his purchase will be deemed to be a purchase *in trust* for his client, if the latter choose so to regard it. A purchase under such circumstances by the attorney, for his own benefit and profit, is inconsistent with the duty he owes to his client, and its advantages may be claimed by the latter at his option. (4 *John. Ch.* 118; 4 *Cow.* 717.) But the purchase in this case was not of the subject matter of the litigations in the suits between Consalus and Linn, as to which the plaintiff was at one time the attorney and counsel of Consalus. Those litigations were in regard to rights and claims preferred by Consalus against Linn; not in relation to demands preferred by Linn against Consalus. In those litigations Linn prevailed, and the judgments, of which the plaintiff became the assignee, were for the costs recovered by Linn against Consalus as a defeated plaintiff. The plaintiff was not, therefore, the purchaser of the subject matter of the litigation in those suits, nor of any interest therein. Hence it follows that the rule, that an attorney shall not be permitted to purchase from his client's adversary the matter in litigation, and hold it to the disadvantage and against the wishes of his client, has no application here—for the reason that the plaintiff did not purchase any subject matter in litigation in the suits between Consalus and Linn.

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There is still another principle urged as applicable to this case, which will now be considered.

The disability of an attorney to purchase a demand against his client, as to which he has been retained and consulted, and to hold it for his own benefit against the wishes of his client, will continue in some cases after the confidential relation has ceased. It has been held that such disability continues so long as the reason for it exists. (8 *Clark & Finnel.* 657; 25 *Penn. R.* 354.) It was said, in the first case cited, that an attorney is disabled from purchasing for his own benefit charges on his client's real estate without his permission; and the disability will continue as long as the reason exists, although the confidential employment may have ended. In the last case cited, it was held that the disability did not terminate with the relation of attorney and client, but was perpetual in its character; so that the purchase of any adverse claims or rights by the attorney will be held to be in trust for the former client and those claiming through or under him. (See also 5 *John. Ch.* 44.) To the same effect is the decision in *Galbraith* agt. *Elder* (8 *Watts*, 81). These cases show that the attorney will not be permitted to buy and hold for himself against his former client a right, claim or demand as to which he had been the adviser of the latter; for it will be presumed that he acquired information in regard to it under the confidence of his former relation, or in the exercise of his duty as attorney and counsel. In such case, an obligation remains to be faithful to the trust reposed in him, notwithstanding his employment may have terminated: and it is not in his power to relieve himself from a disability which he voluntarily assumed, and which became permanent so soon as it attached. It is no answer in a case of this character to say, that the demand was already fixed and determined as a legal obligation; that the claim was open alike to all purchasers; and that the party is not injured in being compelled to pay a just and

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legal debt. This might be said of very many cases of purchases, by attorneys during their confidential employment, of interests in the subject matter of the litigation. But a principle of public policy and natural equity intervenes, and denounces the act as unfair, because accomplished under circumstances of temptation which might lead to violations of just obligations and duties. As is said by Judge Story, this doctrine of restraint and disability is founded in an anxious desire of the law to apply the principle of preventive justice, so as to shut out the inducement to perpetrate a wrong; and by disarming parties of all legal sanction and protection for their acts, to suppress the temptation which might otherwise be found too strong for virtue.

Here, it is true, the purchase was not a purchase of the subject matter of the litigation in the suits between Consalus and Linn. If it had been, the plaintiff, according to the authorities cited, could not have purchased and held the purchase for his own benefit in defiance of his former client. He would have been presumed to have acquired a knowledge of those matters during his confidential employment which would put him under a disability to hold the purchase for his own advantage, in case his client saw fit to claim its benefits to himself. But the purchase was of judgments for costs, embracing no litigated claim, and if no question as to their effect or validity had been raised, nor any effort been made to resist their collection, I can see no reason why the plaintiff would not have been at liberty to purchase and enforce them, the same as if he had been an entire stranger to them. Being formally entered they became ostensibly the adjudication of the court, and the plaintiff's duties in regard to them ceased, unless he again laid himself under obligation by a further retainer to defeat their effort.

It appears, however, that a serious question arose in regard to their validity, and it seems that the defendant

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retained the plaintiff to resist them. He advised the defendant that they were void, and repelled by his threats all attempts to enforce them until his employment by the defendant as attorney and counsel ceased. In this he undoubtedly acted in good faith and in perfect obedience to duty; and his advice was not without judicial sanction. But afterwards he stepped in and purchased the judgments for a small sum, and seeks to enforce them against his former client for their full amount. Is he not prohibited from so doing? Under these circumstances must not his purchase be deemed to enure to the benefit of the defendant to the extent of the sum discounted to him on the purchase? He had been the attorney and counsel of the defendant during the progress of the suits which terminated in judgments against the latter for costs, and was thereafter the counsel of the defendant in regard to those judgments, and advised him that they were void and could not be enforced. This was his relation to the defendant and to these judgments until 1860. If he had purchased them for a trifle while under employment by the defendant to resist and defeat them, most clearly the purchase would have been held to be for the benefit of the latter at his election; and we have seen that the right remains to the client to claim the advantages of a purchase by the attorney of the subject of the retainer after his confidential employment has terminated. I am persuaded that the plaintiff can have only the amount advanced by him on the purchase of the judgments, with interest thereon from the time of the purchase. For the recovery of this amount he is at liberty to issue execution on each of the first two judgments mentioned in the complaint as specified in my findings and decision.

It does not follow from these conclusions that the plaintiff has been guilty of any moral turpitude, or of any breach of duty, or actual violation of good faith, as an attorney and counsel; for it does not appear that he did in fact

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acquire any information in regard to these judgments during his confidential employment, which gave him any advantage over the defendant, not possessed by every other person, in or out of the profession. These conclusions result from an application of principles of preventive injury, which often attach to innocent transactions with the same legal force as if the transactions were in fact unjust and fraudulent. So it sometimes happens that acts wholly free from evil design are held fraudulent or illegal for the reason that their tendency in general is to wrong and public or private injury.

The defendant's counsel insists that this is an action in equity; hence that the costs are in the discretion of the court. In this I think he mistakes. The action is in the nature of a *scire facias*, and is strictly an action at law. The costs follow the recovery as a matter of course. It has been treated as a case in equity by the counsel on both sides from the first, and I have permitted it to be tried and heard as an equity cause, no objection being made. But if an action in equity, costs should be allowed I think to the plaintiff. He moved in the first instance for liberty to issue execution on the judgments. The defendant could then have tendered the amount advanced by the plaintiff in their purchase, or consented that executions might issue for that amount; but he resisted the motion—insisted that the judgments were paid—and also urged the defence which on the trial was determined to be without foundation in fact. He demanded that the plaintiff should be put to his action on the judgments. Consequently the motion was denied, with liberty to the plaintiff to bring this action. Here, too, various defences were interposed, all of which have been found to be unsubstantial. It is said that the defendant succeeds in part, but his partial success is not on any of the points litigated under the answer, and could have been just as well and effectually raised on the motion for leave to issue execution, as on trial in an action. The

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plaintiff has succeeded on all the questions of fact litigated, and also on most of the questions of law. He should be allowed the costs of the action, with an extra allowance of five per cent. on the amount of the recovery. The case has been sharply litigated, and is peculiar both in respect to matters of law and fact. It has, too, involved much labor in its progress.

The plaintiff must have judgment in accordance with the above views.

SUPREME COURT.

THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, respt's
agt. THE CLEVELAND, COLUMBUS & CINCINNATI RAILROAD
COMPANIES, app'ts.

Railroad bonds, payable to A. B. or holder, at a particular place, are negotiable, passing by delivery, whether under seal or not, or whether or not indorsed by the payee.

The interest coupons upon such bonds are negotiable promises to pay a certain sum of money at a certain time, to the holder, so made as to be cut off and circulated independently of the bond; and if not paid when due, interest may be allowed upon them by way of damages for the delay of payment.

Where a guaranty of such railroad bonds is made by third persons by indorsement thereon, "for value received," the guaranty is not an accommodation guaranty or indorsement, but expresses a sufficient consideration upon its face.

Where there is a state law authorizing any two or more railroad corporations created under the laws of such state, whose lines are connected, to enter into any arrangement, to aid in the construction of any road requiring it, by subscription to its capital stock or otherwise, for their common benefit, it authorizes the guaranty of the bonds issued by such corporation to be made by any other corporation who is party to the arrangement.

Where a law of another state declares that no director of a railroad company shall purchase any of the bonds of any railroad of which he may be a director, for less than the par value thereof, and that all such bonds, &c. so purchased shall be void, and the supreme court of that state have decided that certain railroad bonds alleged to have been purchased in violation of this act are valid securities, and upon which the holders are entitled to recover the full amount of principal and interest, without reference to the amount paid for them, the courts of this state, where that question arises, will consider it settled by such decision.

Guarantors of railroad bonds may be liable independently of the question whether the bonds are void under a certain statute.

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Where the action is brought upon the bonds and coupons of a railroad corporation created in another state, but are *payable in this state*, the cause of action arises here, and this court has jurisdiction, though both parties are foreign corporations. (*See S. C. 23 How. Pr. R. 180.*)

New York General Term, May, 1863.

SUTHERLAND, P. J., LEONARD and MULLIN, JJ.

THIS action was brought to recover the amount due on one hundred and forty coupons, originally attached to twenty bonds issued by the Columbus, Piqua & Indiana Railroad Company, the payment of which was guaranteed by the defendants by written indorsements on the bonds, guaranteeing the payment of principal and interest.

The defendants set up in their answer that the guarantees were unauthorized, and without consideration, and that the plaintiffs had notice of it; also that the bonds were purchased from the Piqua company by one William Dennison, jr., for less than their par value, and that he was at the time of such purchase a director of that company, and that by the laws of Ohio the bonds for that reason became void, and that the defendants were induced to make the guarantees by false representations made by the said William Dennison, jr., and one William Neil, of all which the plaintiffs had notice; also that the defendants were accommodation guarantors, and that the plaintiffs took the bonds with knowledge of the matters alleged by the defendants, and paid nothing except a small percentage for the bonds; also that the original issuing of the bonds was contrary to the laws of Ohio; also that an injunction was pending, which forbade payment.

On the trial of the action at the circuit there was a verdict for \$6,378.62 for the plaintiffs, from the judgment entered on which, the defendants have appealed to the general term.

E. S. VAN WINKLE, *for the appellants.*

I. The judge erred in directing the jury to allow plaintiffs interest on the coupons from their respective dates,

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because interest on interest cannot be recovered until *after* judgment, or upon a special agreement, made *after* the interest is due. (*State of Conn.* agt. *Jackson*, 1 *Johns. Ch. R.* 13; *Van Benschoten* agt. *Lawson*, 6 *J. Ch.* 313; *Toll* agt. *Hiller*, 11 *Paige*, 228; *Mowry* agt. *Bishop*, 5 *Paige*, 98; *Quackenboss* agt. *Leonard*, 9 *Paige*, 334; *Doe* agt. *Warren*, 7 *Greenl.* 48; *Sparks* agt. *Garregues*, 1 *Binney*, 165; *Hastings* agt. *Wiswall*, 8 *Mass. R.* 455; *Parsons on Contracts*, 2d vol. p. 428, and cases referred to in note r.)

N. B. The case of *Greenleaf* agt. *Kellogg*, (2 *Mass.* 548,) is overruled in 8 *Mass.* 455, and 7 *Greenl.* 48.

II. The defendants being indorsers or guarantors, without consideration, and for accommodation, are only liable to *bona fide* holders, for value received, to the extent of the value paid, and the defendants having shown they were mere accommodation indorsers, the burden of proving *bona fides*, and value paid, was on the plaintiffs, which they have failed to do, so far as regards the *bona fides*. (*Chit. on Bills*, 9th ed. 70; *Wiffin* agt. *Roberts*, 1 *Esp.* 261; *Ingalls* agt. *Lee*, 9 *Barb. S. C. R.* 647; *Rapelye* agt. *Anderson*, 4 *Hill*, 472.)

1. The defendants were mere accommodation indorsers or guarantors.

The bonds were the liabilities of the Piqua railroad. None of the proceeds were to be received by the defendants. There was no binding obligation on anybody to do anything for the defendants, in consequence of their guaranteeing the bonds. In the eye of the law they were mere accommodation indorsers. The guarantees were given on the 7th April, 1854, and under the alleged authority of a resolution passed on 6th March, 1854. These bonds at that time were the property of Messrs. Neil & Dennison, to whom the Piqua road sold them on 25th February, 1854.

The Piqua road had no interest in the guarantee, and the defendants did not and were not to receive any consideration from said Neil & Dennison.

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2. The plaintiffs were not *bona fide* holders of said bonds. They did not receive them in the usual course of business; they did take them with notice of facts to impeach their validity. The *bona fides* is not determined by the adequacy of the consideration, for a low price or a high price may be equally paid in good faith or in bad faith. Neither is the *bona fides* determined by the belief that the guaranteees were valid, for such an honest belief, coupled with notice, actual or constructive, that they were not valid, would defeat the *bona fides*. Now the plaintiffs had such notice that the bonds were not valid. The guaranteee was by one railroad company of the bonds of another railroad. This act requires a special legal authority, and purchasers were bound to see that it existed. The guaranteee expressed it was in consequence of a resolution of the board, passed at such a time. This showed it was not an ordinary act, done by general authority, but an extraordinary act, done by special authority. The purchasers were bound to inquire whether such resolution was in pursuance of any legal authority. The simultaneous indorsement of three separate guaranteees on the bonds of one railroad company by three several railroad companies was notice that it was a special act, and not in the ordinary and legitimate business of a railroad company. Inquiry would have shown that the indorsement was unauthorized. (See next point.)

The plaintiffs were allowed by the judge to recover the face of the coupons and interest; and yet it appears they paid only about seventy-five or eighty per cent. for them. See the testimony of Jas. Goodwin, commencing at fol. 597.

III. The guaranteee was void, because neither the charter of the defendants, nor any law of the state of Ohio, nor any general rule of law authorized the defendants to indorse the bonds. See the charter of the company, at fol. 613 of the case, where the corporators are incorporated "for the purpose of constructing a railroad from the city of Cleveland, through the city of Columbus and the town of Wil-

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mington, to the city of Cincinnati, and they are hereby invested with the powers and privileges which are by law incident to corporations of a similar character, and which are necessary to carry into effect the objects of the company." The act of revival conferred no additional powers.

The defendants, therefore, had no authority, by their charter, to indorse the bonds of another railroad company. Nor had they such right by any general principle of law. (*Bank of Genesee* agt. *The Patchin Bank*, 3 Kern. 309; *Morford* agt. *Farmers' Bank of Saratoga*, 26 Barb. 568; *Bridgeport Farmers' and Mechanics' Bank* agt. *The Empire Stone Dressing Co.* 10 Ab. Pr. R. p. 47; *Bridgeport City Bank* agt. *The Empire Stone Dressing Co.* 19 How. P. R. 51.)

But the power is claimed to be found in the acts set out at fol. 140, and seq., being an act passed March 3, 1851, and an act passed May 1, 1852. There are four provisions in these acts under which, if at all, the right of the defendants to guarantee the bonds of the Piqua company can be found. Those four are as follows: the first authorizes two railroad companies, in certain contingencies, to consolidate themselves into one corporation. That is not this case. The third authorizes any railroad, in certain cases, to purchase or lease all or any part of another road. That is not this case. The fourth authorizes any two or more railroads, whose lines are connected, to enter into any arrangement for their common benefit. This evidently refers to arrangements as to the management of the road, price of fare, time of running, number of trains, etc. It only remains to notice the second provision, which is in these words: "Any railroad company, heretofore or hereafter incorporated, may at any time, by means of subscription to the capital stock of any other company, or otherwise, aid such company in the construction of its railroad, for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing such aid." Now, this subscription was not made for such pur-

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pose, but for the purpose of freeing another railroad from an injunction, and to enable it to change its gauge. These remarks relate to the act of 1851.

The act of 1852 is set forth at fol. 142. It is in substance the same.

IV. The bonds themselves were void under the laws of the state of Ohio, act of December 15th, 1852, which declares that no bonds issued by any railroad company of the state of Ohio shall be purchased by a director of the institution at less than par, and if so purchased shall be made null and void; and these very bonds of the Piqua company were purchased by Dennison when he was a director of said company. (*See the act at fol. 734.*)

The resolution authorizing the issue of the bonds was passed January 7th, 1854. Dennison was then a director, and was present at the meeting.

The written agreement of sale to Dennison was concluded on the 25th February, 1854. On the 14th February, 1854, Dennison was re-elected. He offered a resignation on March 3d, 1854, which was accepted, and the office declared vacant; but the laws of Ohio declare that directors shall continue such until their successors are elected and qualified. (*Act of February 11th, 1848, §7.*)

That notes and other commercial paper, when declared void by statute, are void even in the hands of *bona fide* holders. (*See Rost agt. Goddard, 3 McLean, 102; Bridge & al. agt. Hubbard, 15 Mass. 96; Sauerwein agt. Brunner, 1 Harris. & Gill, 377; Lucas agt. Wool, 12 S. & M. 157; Story on Prom. Notes, §192; 3d Kent's Com. 87, 90; Chitty on Contracts "of contracts void by statute."*)

V. If the bonds were void the guarantee was void. It is of the essence of a guarantee that there should be the valid obligation of a principal debtor. If there be no valid obligation, the guarantor or indorser is not bound. (*Warren agt. Crabtree, 1 Greenl. 169; Garther agt. F. and M. Bank of Georgetown, 1 Peters, 37; S. C. 7 Curtis, 441; Harrison agt.*

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Hammell, 5 Taunt. 780; Swift et al. agt. Beers, 3 Denio, 70; Hayden agt. Davis, 3 McLean, 277; Bright et al. agt. Schuer, Ohio R. 139, 141; Robinson agt. Abell, 17 Ohio R. 36, 43.)

Neither was there any sufficient presentation for payment. If the place or office named had ceased, or become impracticable, a demand should at least have been made of the guarantor, and of the maker; and it would seem that notice of presentment and non-payment by the maker should have preceded a suit against the guarantor.

VI. As the bonds were not indorsed by the payee therein named, the plaintiffs cannot legally be the holders thereof. (*Avery agt. Latimer, 14 Ohio R. 542, 544.*)

VII. This court has no jurisdiction of this case. The suit is brought by a foreign corporation; the defendants are a foreign corporation; no suit can be brought against a foreign corporation, except in the following cases:

1st. When the plaintiff is a resident of this state.

2d. When the plaintiff is not a resident of this state, when the cause of action shall have arisen, or the subject of the action shall be situated within this state. (*Code of Procedure, S. 427.*)

Neither the cause of action arose here nor is the subject matter situated here.

The cause of action arose in Ohio, where the bonds and guarantee were made and executed, and where the parties to the contract resided.

There is no subject of this action; that clause relates to specific personal or real property situated here. If this action has any "subject," it is the defendant's contract. The object of the action was undoubtedly to get defendant's money in New York, but the subject of an action and the object of an action are distinct things. (*The Western Bank agt. The City of Columbus, 7 How. 238; Cantwell agt. Dubuque Western R. R. Co. 17 How. p. 16; Whitehead agt. Buffalo & Lake Huron R. R. Co. 18 How. 218; Campbell agt. Co-proprietors of Champ. & St. Lawrence R. R. 18 How. 412.*

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See as to "subject matter of the action:" *Bank of Commerce* agt. *The Rutland & Wash. R. R. Co.* 10 *How.* 1.)

Where the court has not jurisdiction of the subject matter, no consent or appearance can confer jurisdiction, and an objection to jurisdiction can be taken at any stage of the action. (*Harriott* agt. *The N. J. R. R. & Trans. Co.* 2 *Hilton*, p. 262, and cases there cited.)

W. E. CURTIS, *for the respondents.*

I. The defendants' first exception is at fol. 137, where they make the objection that the bonds were not made under seal, and not indorsed by the payee. The defendants' exception at fol. 746 raises the same question. The court properly overruled the objection. The bonds are drawn payable in the city of New York to Elias Fassett, or holder, and are negotiable, passing by delivery, and have been so adjudged. (*Zabriskie* agt. *The Cleveland, Columbus & Cincinnati R. R. Co.* 23 *How. U. S. R.* 400.)

The bonds and coupons are payable in this state, and the cause of action arose here, and the law merchant applies to their transfer. (*The Conn. M. L. Ins. Co.* agt. *The C. C. & C. R. R. Co.* 23 *How. Pr. R.* 180.)

There is nothing in the laws or decisions of Ohio changing the law merchant as to the transfer of notes or securities payable to "any person or holder." See the language of the bonds and coupons at fol. 129 and 123.

"It has been repeatedly held in Ohio that affixing seals to such an instrument does not vary the commercial characteristics of the paper." (*Bain* agt. *Wilson*, 10 *Ohio State R.* 19; *Bank of St. Clairsville* agt. *Smith*, 5 *Ohio*, 222.)

II. The second exception of the defendants is to the ruling of the judge, at fol. 741, that the plaintiffs are entitled to recover interest upon the coupons. The judge did not err. The coupons are negotiable promises to pay a certain sum of money at a certain time to the holder, so

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made as to be cut off and be circulated independently of the bonds. If not paid when due, the general rule as to interest applies to them the same as to any other negotiable security. It is a contract between the maker and the holder, and may be sued without producing the bond. (*Comm'r's of Knox Co.* agt. *Aspinwall*, 21 *How. U. S. R.* 539; *Redfield on Railways*, § 239, and cases cited in note; *Hollingsworth* agt. *Detroit*, 3 *McLean*, 472; *County of Beaver* agt. *Armstrong*, *Legal Intelligencer*, vol. 20, p. 44; *Watkinson* agt. *Root*, 4 *Hammond's Ohio R.* 373; *Forbes* agt. *Canfield*, 3 *id.* 18; *Pierce and another, executors* agt. *Rowe*, 1 *Adams' N. H. R.* 179; 2 *Curwen's Ohio Statutes*, 1407, 1569; 3 *id.* 2317.)

III. The third exception of the defendants is at fol. 743, where the judge declined to instruct the jury that the defendants, being indorsers or guarantors without consideration and for accommodation, are only liable to *bona fide* holders for value received, to the extent of the value paid, and the defendants, showing they are mere accommodation indorsers, the burden of proving *bona fides* and value is on the plaintiffs.

The judge did not err. The consideration is expressed on the face of the guaranty. (*Miller* agt. *Cook*, 22 *How. Pr. R.* 66.)

If it is admissible to inquire beyond the face of the instrument, then the plaintiffs urge that there was no evidence in the case showing that the defendants were indorsers or guarantors without consideration, but, on the contrary, showing that they were guarantors for a good consideration.

The only evidence, independent of the face of the paper, in respect to the consideration for the guaranty, is to be found in the printed record in the case of *Zabriskie* agt. *The C. C. & C. R. R. Co.* (reported 23 *How. U. S. R.* 381), and in which it clearly appears that there was a good and valuable consideration, *viz*: the obtaining control, by the

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defendants, of various beneficial interests, including a change of gauge and railroad connection, to increase their business. (*See opinion on this point*, 23 *How.* 399.)

Even if there had been evidence to warrant the judge in charging as requested, that the guaranty was without consideration and for accommodation, still there is no foundation for the limitation of the defendants' liabilities as claimed, and if there was, it must apply to an action on the bonds and not to one on the coupons, as they are of themselves an independent engagement and negotiable.

The laws of Ohio, in relation to the issue of these bonds, expressly negative any such limitation of liability. The statutes of Ohio provide, that in case of sales of bonds by directors at a discount, "such sale shall be as valid in every respect, and such securities as binding for the respective amounts thereof, as if they were sold at their par value." (*Swan's Ohio Stat.* pp. 200 and 240.)

The supreme court of Ohio held, on appeal, that these very bonds were valid securities, and held that an order requiring the bondholders to state the amounts paid for the bonds was erroneous. (*Cox agt. Columbus & Piqua R. R. Co.* 10 *Ohio State R.* 375, 395 to 399, and 410.)

There was no attempt, on the part of the defendants, to show any notice to the plaintiffs of any of the matters set up in the answer.

IV. The fourth exception of the defendants is at fol. 744 of the case. The judge very properly declined to instruct the jury, as requested, that the guaranty of the defendants was unauthorized and unlawful. He followed the decision of the supreme court in the case of *Zabriskie against the defendants* (23 *How.* 381), where the same questions in respect to these bonds were considered and decided, and upon the same evidence.

The statutes of Ohio authorized the making of the guaranty by the defendants. (2 *Curwen R. S.* p. 1657, § 4; 3 *id.* p. 1884, § 24.)

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These sections of Ohio law are also at pages 39 and 40 of case. (*Zabriskie agt. C. C. & C. R. R. Co.* 23 *How. U. S. R.* 395 to 399.)

The plea of *ultra vires*, according to its just meaning, imports, not that the corporation could not and did not in fact make the unauthorized contract, but that it ought not to have made it. Such a defence therefore necessarily rests upon the violation of trust or duty towards the shareholders, and it is not to be entertained where its allowance will do a greater wrong to innocent third parties.

The acquiescence of the shareholders in the abuse will prevent the interposition of such a plea. (*Bissell agt. The Michigan Southern and Northern Indiana R. R. Co's.*, 22 *N. Y. R.* 258; *Society for Savings agt. New London*, 1 [*N. S.*] *Am. Law Reg.* 241.)

V. The fifth exception of the defendants is at fol. 745. The judge did not err in declining to instruct the jury as requested, that the plaintiffs could not recover because the bonds were void under the act of the state of Ohio, Dec. 15th, 1852, in respect to annulling bonds purchased by a director of the institution issuing them, at less than par, and also that Dennison was in law a director when he purchased them.

The supreme court of Ohio have decided that these identical bonds are valid securities, and upon which the holders are entitled to recover the full amount and interest, without reference to what they paid for them. (*Coe agt. Columbus & Piqua R. R. Co.* 10 *Ohio State R.* 395 to 399, and 410.)

The U. S. supreme court say: "In deciding upon this contract, we deem it unimportant to settle whether Dennison was a director of the Piqua company the 25th of Feb., 1854, when he signed the contract with the committee of the Piqua board of directors." (*Zabriskie agt. C. C. & C. R. R. Co.* 23 *How. U. S. R.* 399.)

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The testimony shows Dennison was not a director of the Piqua company.

VI. The sixth exception of the defendants is at fol. 746. The court did not err in declining to instruct the jury that if the bonds were void the guaranty was void.

1. The U. S. supreme court held, that in deciding upon the validity of the guaranty it was unimportant to settle whether the bonds of the Piqua company were null and void. "The contract of the guarantors indorsing the bond is a distinct contract, and may impose an obligation upon them, independently of the Piqua company." (Zabriskie agt. C. C. & C. R. R. Cr. 23 *How. U. S. R.* 399.)

The indorser is liable, though the maker's name is a forgery, or the note for any other reason is void. (*Edwards on Bills*, p. 289.)

2. The guarantor may be held, although no suit could be maintained upon the original debt, and such guaranty may have been required for the very reason that the original debt could not be enforced at law, as where the guarantor promises to be responsible for goods to be supplied to a married woman, or to be sold to an infant not being necessaries. (1 *Parsons on Contracts*, 494, and cases cited in note; *Mann* agt. *Eckford*, 15 *Wend.* 502.)

3. The defendants' objection does not extend to the coupons, but is limited to the bonds only.

VII. The seventh and last exception of the defendants is a repetition of the question raised by his first exception, and has been considered under the first point.

VIII. The judgment appealed from should be affirmed, with costs to the plaintiff.

By the court, SUTHERLAND, Justice. The bonds are payable in the city of New York, to Elias Fassett, or *holder*. They are negotiable, passing by delivery, and would have been had they been under seal. Their negotiability was

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assumed if not decided in *Zabriskie agt. The Cleveland, Columbus & Cincinnati R. R. Co.* (23 How. U. S. R. 400.)

Similar bonds have repeatedly been held by the courts to be negotiable. It was so held or assumed recently by the court of appeals of this state, in an action on one or more Harlem railroad bonds under seal, I believe. (See also *Redfield on Rail.* § 239, and cases cited in note.)

It has been repeatedly held in Ohio, that affixing a seal to such an instrument does not affect its negotiability. (See *Bain agt. Wilson*, 10 Ohio S. R. 19; *Bank of St. Clairsville agt. Smith*, 5 Ohio, 222.) The English decisions are, I think, to the same effect. This point is raised by the defendant's first exception when the case was submitted to the jury. Neither exception was well taken.

In my opinion the judge was right in permitting the plaintiffs to recover interest on the coupons. This point is presented by the defendants' second exception. The coupons are negotiable promises to pay a certain sum of money on a certain day to the holder, so made as to be cut off and circulated independently of the bond. If not paid when due I think interest should be allowed by way of damages for the delay of payment. They do not contain any express promise to pay interest on the interest, and if they did I think interest would or should be allowed, not by force of the promise, but as compensation for the delay of payment by way of damages. The general rule is that when there is a written contract to pay money on a day, and not a place fixed, and the contract is broken, interest is allowed. (*Williams agt. Sherman*, 7 Wend. 109; *Still agt. Hall*, 20 id. 51, 52; *Reid agt. Rensselaer Glass Co.* 3 Cowen, 436; *S. C. in error*, 5 id. 587.)

The chancery cases in this state are undoubtedly to the effect that compound interest can only be recovered upon a written agreement to pay it, made after the interest upon which it operates has fallen due. (*State of Connecticut agt. Jackson*, 1 John. Ch. 13; *Van Benschoten agt. Lawson*, 6 John.

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Ch. 313; Mowry agt. Bishop, 5 Paige, 98; Quackenbush agt. Leonard, 9 id. 334; Toll agt. Hiller, 11 id. 228.)

In *State of Connecticut* agt. *Jackson* Chancellor *KENT* says: "Even an original agreement at the time of the loan or contract, that if interest be not paid at the end of the year, it shall be deemed principal, and carry interest, will not be recognized as valid: such a provision would not amount to usury (*Le Grange* agt. *Hamilton*, 4 Term R. 613; 2 *H. Black.* 144), but this court certainly, and *perhaps* a court of law, would not give effect to such a provision."

In *Van Benschoten* agt. *Lawson* (*supra*) the chancellor held that the agreement, though made *after* the interest had fallen due, must be prospective in its operation, as that the interest then *due* and payable should carry interest thereafter.

In *Mowry* agt. *Bishop*, (5 *Paige*, *supra*.) Chancellor *WALWORTH* held that an agreement to pay interest on *arrears* of interest, which had already become due, *was* valid, and that if compound interest is voluntarily paid, it could not be recovered back; that the moral obligation of the debtor to make the usual remuneration for the loss of interest sustained by the creditor, was a sufficient consideration to support a subsequent agreement in writing to pay interest on such arrears of interest.

I have some difficulty in seeing if such moral obligation is sufficient to support such subsequent written promise, why it was not right to allow the plaintiffs in the principal case interest upon their coupons without any promise.

In *Mowry* agt. *Bishop* the chancellor said that the principle that an agreement to pay interest upon interest to accrue after the making of the agreement, cannot legally be enforced, was adopted merely "as a rule of public policy to prevent an accumulation of compound interest in favor of *negligent* creditors who do not call for the payment of their interest when due."

The reason or ground of the general rule that interest

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upon interest cannot be recovered as thus stated, certainly does not apply to the principal case, and should not have prevented a recovery of the interest on their coupons. There is no danger of railroad creditors being negligent in presenting their coupons for payment; though they may run other risks, railroad corporations certainly do not need protection from want of diligence on the part of their creditors.

In *Van Benschoten* agt. *Lawson (supra)* Chancellor KENT said that agreements to pay interest on interest to accrue would not be enforced because they were oppressive.

I repeat, certainly there is no danger of railroad corporations being oppressed from want of diligence on the part of their coupon creditors.

As to how far the general rule or principle before adverted to as established by the chancery cases in this state has been recognized by the courts of law of this state, see *Kellogg* agt. *Hickok*, 1 *Wend.* 521; *Jackson* agt. *Campbell*, 5 *Paige*, 571; *Boyer* agt. *Pack*, 2 *Denio*, 107; *Van Rensselaer* agt. *Jones*, 2 *Barb.* 666, 667; *Forman* agt. *Forman*, 17 *How. Pr. R.* 255; *Henderson* agt. *Hamilton*, 1 *Hall*, (N. Y. Superior Court) 314.

In *Van Rensselaer* agt. *Jones*, Judge WILLARD appeared to think it by no means clear that the cases in this state would prevent a recovery of interest on interest in a case like the principal case.

There is no doubt that in several of the states the plaintiffs would have been permitted by the court to recover interest. (See *Catlin* agt. *Lyman*, 16 *Vesey*, 45; *Greenleaf* agt. *Kellogg*, 2 *Mass.* 548; *Hastings* agt. *Wirwall*, 8 *Mass.* 455; *Watkinson* agt. *Root*, 4 *Hammond Ohio R.* 373; *Pierce* agt. *Rowe*, 1 *Adams N. H. R.* 179; *Hollingsworth* agt. *Detroit*, 3 *McLean*, 472.)

Upon the whole I can find no good reason nor controlling authority for saying that the plaintiffs should not have recovered interest on their coupons.

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From the transaction I infer that the Piqua company expected to pay interest on their coupons if they were not paid when due.

The judge was right in declining to instruct the jury, as requested by the defendants, that the defendants, being indorsers or guarantors without consideration and for accommodation, are only liable to *bona fide* holders for value received to the extent of the value paid, and the defendants showing that they are mere accommodation indorsers, the burden of proving *bona fides* and values is on the plaintiffs. The defendants were not accommodation indorsers or guarantors. There was a sufficient consideration expressed on the face of the guarantees. The words "value received" imported a sufficient consideration. (*Miller* agt. *Cook*, 21 *How. Pr. R.* 66; *Douglass* agt. *Howland*, 24 *Wend.* 35.) I think, too, the case shows a sufficient consideration for the guarantees outside of them. A railroad corporation must be presumed to be created, not only for public convenience, but also for private profit.

The arrangement which was entered into between the defendants and the other companies, of which the guarantees were a part, was entered into for the purpose of securing uniform gauge of the connecting roads, and then to increase their business and profits.

The presumption is that the defendants have received the anticipated advantages from the arrangement. I think, therefore, that the defendants' third exception was not well taken.

In my opinion, the judge was also right in declining to instruct the jury as requested, that the guarantees were unauthorized and unlawful. No doubt the plea of *ultra vires* raised the question of corporate powers of the defendants to make the guarantees as between the corporation and the state of Ohio, and not merely the question as between the corporation and its shareholders, whether the making of the guarantees was a breach of trust.

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A corporation is the mere creation of law, and cannot act at all without law. A contract made by it without authority is void, even in the hands of a *bona fide* holder for *value*. Its legal capacity to contract cannot be enlarged by estoppel. But I think the defendants were authorized by the sections of the general railroad laws of Ohio, inserted in the case, to enter into the arrangement with the other companies, and to make the guarantees as a part thereof. These sections declare that "any railroad company heretofore or hereafter incorporated, may at any time, by means of subscription to the capital stock of any other company, or *otherwise*, aid such company in the construction of its railroad, for the purpose of forming a connection of said last mentioned road with the road owned by the company furnishing such aid," &c. There is another clause of these sections which authorizes any two or more, whose lines are connected, to enter into any arrangement for their common benefit.

The counsel for the defendants insists that this last provision evidently refers to arrangements as to the management of the road, price of fare, time of running, number of trains, &c. But I do not see why this limited construction should be given the provision, particularly as against the plaintiffs, who are *bona fide* holders for *value*, there being nothing in the case showing that they had notice of any of the defences set up in the answer. The language is broad enough to cover the arrangement which the defendants entered into with the other companies, and the guarantees as a part of it.

Perhaps this question of power may be said to have been decided in *Zabriskie agt. Cleveland, Columbus & Cincinnati Railroad Co.* (23 *How. U. S. R. supra*), although that action was brought by Zabriskie as a shareholder.

It is not necessary to inquire or decide whether the acts of the defendants were authorized or ratified by a vote of the stockholders in accordance with the provisoese of the

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said sections of the Ohio general statutes, if the defendants had the general power to make the guarantees ; for these provisoos were intended for the protection of the shareholders, and relate rather to the mode or manner of the execution of the power ; and the plaintiffs had a right to presume that the defendants had done their duty, and had proceeded regularly in the execution of the power. (See *Commissioners of Knox Co. Indiana* agt. *Aspinwall*, 21 How. U. S. R. opinion p. 545 ; 6 *Ellis & Black.* p. 337 ; *The Royal British Bank* agt. *Tarquand* ; and *Zabriskie against the same defendants*, 23 U. S. R. *supra*.)

This doctrine does not at all interfere with the principle of the limitation of the powers of corporations and its consequences, before stated.

Third parties dealing with a corporation are bound to know the law ; that is, they are bound to take notice of the extent of its powers ; but they have a right to assume, in the absence of anything suggesting inquiry, that it has proceeded regularly in the execution of its powers.

I think, therefore, the defendants' fourth exception was not well taken.

I think the judge was also right in declining to instruct the jury, as requested by defendants, that the plaintiffs could not recover, because the bonds were void under the Ohio act of Dec. 15th, 1852, declaring that no director of a railroad company should purchase any of the bonds of any railroad of which he may be a director, for less than the par value thereof, and that all such bonds, &c. so purchased should be void.

The supreme court of Ohio have decided that these bonds were valid securities, and upon which the holders are entitled to recover the full amount of principal and interest, without reference to the amount paid for them. (*Coe* agt. *Columbus & Piqua R. R. Co.* 10 *Ohio State R.* 395, 399 and 410.) In *Zabriskie against these same defendants* (23 How. U. S. R. *supra*), the U. S. supreme court says :

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"In deciding upon this contract, we deem it unimportant to settle whether Dennison was a director of the Piqua company on the 25th Feb., 1854, when he signed the contract with the committee of the Piqua board of directors."

I doubt, too, whether Dennison was a director on the 25th Feb., 1854, within the meaning and intent of the act of Dec. 15th, 1852, although he may have been within the meaning of the Ohio act of Feb. 11th, 1848, declaring that directors shall continue such until their successors are elected and qualified.

I think, therefore, the defendants' fifth exception was not well taken.

Neither do I think that the defendants' sixth exception was well taken.

The judge declined to instruct the jury that if the bonds were void the guarantees were void. In the case of *Zabriskie*, the U. S. supreme court held that it was not necessary to settle whether the bonds of the Piqua company were void. The court said: "The contract of the guarantors, indorsing the bonds, is a distinct contract, and may impose any obligation upon them independently of the Piqua company."

An indorser may be liable, though the maker's name is a forgery. (*Herrick* agt. *Whitney*, 15 *Johns.* 240; *Shaver* agt. *Ehle*, 16 *Johns.* 201; See also 1 *Parsons on Contracts*, 491, and cases cited in notes.)

It was decided by the general term, in this action—the bonds and coupons being payable here—that the cause of action arose here, and that this court had jurisdiction, though both parties were foreign corporations. (*The Conn. Mu. Ins. Co.* agt. *The C. C. & C. R. R. Co.* 23 *How. Pr. R.* 180.)

My conclusion is, that judgment should be affirmed, with costs.

Stouvenel agt. Stephens.

NEW YORK COMMON PLEAS.

JOSEPH STOUVENEL and FRANCIS STOUVENEL agt. MARGARET A. STEPHENS.

Hearsay evidence is admissible to show the death of a person after a considerable lapse of time; but it is not receivable when the alleged death was of recent occurrence, and when it may fairly be supposed that other and more satisfactory evidence could be obtained.

Hearsay evidence is *intrinsically weak*, incompetent to satisfy the mind of the existence of a fact, and by its admissibility frauds may be practiced under it.

New York General Term, December, 1863.

DALY, BRADY and HILTON, Judges.

APPEAL from a judgment at special term entered on a report of a referee.

By the court, DALY, F. J. The referee found, upon hearsay evidence, of a very loose kind, to the reception of which the defendant objected, that Stephens, the defendant's husband, died before the first of February, 1857. Hearsay evidence is admissible to show the death of a person after a considerable lapse of time (*Jackson agt. Cody*, 9 *Cow.* 140; *Jackson agt. Boneham*, 15 *Johns.* 226; *Lewis agt. Marshall*, 5 *Peters*, 470; *Scott agt. Ratliffe*, *id.* 86), but it is not receivable when the alleged death was of recent occurrence, and when it may fairly be supposed that other and more satisfactory evidence could be obtained (*Jackson agt. Etz*, 5 *Cow.* 319; *Mima Queen agt. Hepburn*, 7 *Cranch*, 290.) Chief Justice MARSHALL, in speaking of hearsay evidence, says that it is excluded not solely upon the ground that it supposes the existence of better testimony that might be adduced, but because of its intrinsic weakness—its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practiced under its cover (*Mima Queen agt. Hepburn*, *supra*), and the case now before us is a good illustration of the soundness of the rule.

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The defendant was informed by several persons that her husband was dead. One of them told her that he had been found dead opposite a burying-ground in Eleventh street, in this city, and one or two others confirmed the statement. As she had been separated from her husband for several years, and as he was a very intemperate man, in the habit of lying about the streets in a state of intoxication, and had once been placed upon Blackwell's Island as a vagrant, she, putting entire confidence in the report of his death, married again, and in a week after the marriage she saw him riding in an omnibus on Broadway.

This occurred in 1856, and it was shown by the testimony of a number of witnesses that Stephens lived in this city afterwards up to January, 1857, when he left the place where he was employed by a Mr. Reed, and went off on a drunken frolic.

Hearsay evidence was received to show that he died about a month after he left the employment of Reed. His brother testified, under the defendant's objection, that a colored man told him in January or February, 1857, that Stephens was found frozen to death in an alley way up town. A witness, named Combs, under a like objection testified that he read an account of Stephens' death in the *Sun* or the *Herald* in the latter part of 1856, or in the fore-part of 1857, and other witnesses were allowed, under objection, to state what they had heard upon making inquiries respecting him, including opinions expressed as to whether he was dead or living.

This hearsay, no more reliable than that upon the faith of which Mrs. Stephens imprudently married again, was received as satisfactory evidence of the happening of an event, assumed to have occurred less than four years before the evidence was given, and was allowed to outweigh the positive statements of witnesses, that they had seen Stephens in the city, and conversed with him, long after the time when, according to this hearsay testimony, he was dead.

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The witness Orr, the keeper of Jefferson market, swore positively that he saw him and conversed with him in the market six months afterwards. The witness knew him twelve years, personally, and described him as dressed up and sober.

Wood, who had known him for twenty years, also swore positively that he saw him three or four times in the winter of 1859 around Washington market, and in January, 1860, that he came into the witness's place in his shirt-sleeves, and that he (the witness) gave him a meal; and hearsay testimony was introduced on the part of the defendant to the effect that Stephens, a short time before the trial, was working upon a farm in Ulster county, in this state.

Pending the cross-examination of the witness Wood, the reference adjourned, and the witness failing to attend on the adjourned day, the plaintiff, when the defendant's testimony was through, moved to strike out the testimony of Wood, and the motion was granted. The plaintiffs then proceeded to examine witnesses, and while the case was thus with the plaintiffs the defendant tendered Wood for further cross-examination to the plaintiffs, but the referee decided that his whole testimony was to be regarded as stricken out. The witness having come in before the testimony was closed, the request that his cross-examination should be completed was a reasonable one, and should have been granted. No injury could result to the plaintiffs. They had already cross-examined the witness to a very considerable length without eliciting anything impairing his positive statement on the direct, and to punish the defendant by depriving her of the whole of the important evidence of the witness because the witness had failed to attend previously was, as I have said, unreasonable, nothing appearing on the face of the case to warrant a suspicion that he had been intentionally kept away by the defendant.

The judgment should be reversed.

Morris agt. Morange.

HILTON, J. I agree with Judge DALY, that improper evidence was admitted by the referee respecting the death of the husband of the defendant.

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SUPREME COURT.

WILLIAM A. MORRIS and others, executors, &c. agt. HENRY H. MORANGE and others.

The Code (§ 332) limits the time within which *appeals* may be taken, to *thirty days*; and unless the *notice of appeal* is *actually served on the clerk within that time*, the right to appeal is *lost*. (See Crittenden agt. Adams, 5 How. Pr. R. 310, also holding that the time of service of notice of appeal upon the clerk, when made by mail, does not date from the time of depositing in the post-office.) Where the *notice of appeal* was *mailed to the clerk* on the thirtieth or last day for bringing the appeal, but not *actually received by the clerk* until *four days afterwards*, *held*, that the notice of appeal was insufficient to give the *appeal effect*; and the court had no power to grant any relief to the appellant by which he could make his intended appeal effectual.

Kings General Term, December, 1863.

Present, BROWN, SCRUGHAM and LOTT, Justices.

APPEAL from an order made at special term setting aside and taking from the files the case and notice of appeal filed by the defendant Morange, on the ground of irregularity. The defendant Morange deposited in the post-office in New York, a notice of appeal in the action, addressed to the plaintiffs' attorney, "Brooklyn, E. D.", and another to "the clerk of Kings county, Brooklyn," on the 19th day of March, 1863, the day on which the time to appeal (thirty days) expired. The notice of appeal mailed to the clerk was not received by him until four days afterwards.

On the hearing of the motion at special term, Mr. Justice LOTT made the order, with his reasons therefor, as follows:

"Motion on behalf of plaintiffs to set aside and take from the files the case and notice of appeal filed by defendant Morange, on the ground of irregularity, granted with

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\$10 costs, with liberty, however, to the said defendant to present the case as made by him, and the amendments proposed thereto on the part of the plaintiffs, to the justice who tried the cause, for settlement, within ten days after service of a copy of the order to be entered herein, on a previous notice to the plaintiffs' attorney of five days, and on the payment of the ten dollars costs of this motion.

"The notice of appeal was not filed with the clerk within the time prescribed, by the Code. The deposit of it, although on the thirtieth day, in the post-office, was not a sufficient service on or notice to the clerk; it having, in fact, not reached him until four days afterwards. (*See Crittenden agt. Adams*, 5 *How. Pr. R.* 310.) The case as presented is, therefore, one where the notice of appeal was insufficient to give the appeal effect, and does not fall within the provisions of section 327, authorizing an amendment. (*See People agt. Eldridge*, 7 *How. Pr. R.* 108.) I can therefore not grant any relief to the defendant by which he can make his intended appeal effectual."

H. H. MORANGE, *appellant, in person, and*
E. A. BREWSTER, *counsel.*

I. The notice of the entry of the judgment was served on the attorneys for the defendant Morange, on the 17th day of February, 1863. The notice of appeal was served on the plaintiffs' attorney and the clerk of Kings county, by mail, on the 19th day of March, 1863, or the thirtieth day after the service of the notice of judgment.

The defendant was entitled to the full thirty days to serve his notice of appeal. (*Code*, § 332.)

Service may be made by mail in all cases. (§ 410, *Code*.)

The service of the notice of appeal was therefore regular, and the order setting it aside and directing it to be taken from the files should be reversed.

II. The order is appealable. It was made in a summary

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application in an action after judgment, and affected a substantial right. (*Code*, § 349, *sub. 5.*)

III. The Code contains no special provision as to the manner in which a notice of appeal shall be served on the clerk, except the general provisions in chapter 11 as to the service of papers. It does not require a personal service. It does not require that the notice of appeal shall be actually filed within the thirty days, but only that it be *served* within that time.

In the absence of any restriction, any mode of service authorized by the Code, in the case of a party or attorney, should be held sufficient in the case of service on the clerk.

The special term case of *Crittenden agt. Adams* (5 *How.* 310), should not be followed in this case. It is clearly wrong on one of the principal points decided in it, and contains no argument in support of the position that service cannot be made on the clerk by mail.

THEODORE F. JACKSON, for plaintiff and respondent.

By the court, SCRUGHAM, Justice. Section 332 of the Code requires that an appeal must be taken within thirty days after written notice of the judgment or order shall have been given to the party appealing.

The appeal is taken by the service of a notice in writing on the adverse party, and on the clerk with whom the judgment or order appealed from is entered, stating the appeal from the same or some specified part thereof. (*Code*, § 327.)

The time to appeal in this case expired with the 19th day of March, 1863, and on that day the defendant Morange deposited in the post-office in New York a notice of appeal addressed to the plaintiffs' attorney, "Brooklyn, E. D.," and another to "the clerk of Kings county, Brooklyn."

The object of section 332 is to limit the time within which appeals may be taken to thirty days, and unless

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notice is actually served on the clerk within that time, the right to appeal is lost.

The Code and statutes have provided that service of certain papers may be made on certain designated persons in a manner therein specified; but, in the absence of such particular statutory provision, service of a written notice can only be made by the delivery of the paper to the person upon whom it is to be served. An actual manual delivery may not be necessary, but the receipt of the paper by the person to be served is essential.

The provisions of the Code (§§ 410, 411) for service by mail, only allow such service upon parties to actions and their attorneys; and while they render the service of the notice of appeal upon the plaintiffs' attorney in this case sufficient, they have no such effect as to the notice which the defendant was required to serve upon the clerk.

The notice mailed to the clerk was not received by him until the 23d March, 1863, four days after the time to appeal expired.

The order should be affirmed.

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SUPREME COURT.

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The common law right of the husband as *tenant by the curtesy* is not abolished by the acts of 1848 and 1849, for the more effectual protection of the property of married women; but is subject to be defeated by a disposition of the property by the wife during her life by deed or will.

An action of *partition* cannot be prosecuted by or in behalf of an *infant* as plaintiff, without the appointment by the court of a *next friend*, pursuant to the act of 1852.

Such next friend must give *security*, as required by that act.

An appointment of a *guardian* to protect the interest of an infant plaintiff in partition, under section 116 of the Code of Procedure, is a *nullity*.

No will partition be ordered upon the application of an infant, unless it be made satisfactorily to appear that the interests of the infant require such partition or sale.

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Saratoga Special Term, October, 1863.

THE facts of the case sufficiently appear from the opinion of the court.

M'MARTIN & AKIN, for plffs.

WELLS & DUDLEY, for def'ts.

BOCKES, J. This is an action for partition, and is brought by a father and his two infant children against Gulick and wife—Gulick, as is charged, holding an undivided interest in the premises as tenant in common with them.

Lansing, the father, claims an interest in the premises as tenant by the courtesy. It has been held in some cases that the acts of 1848 and 1849, for the more effectual protection of the property of married women, abolished tenancy by the courtesy. (28 *Barb.* 343; 11 *How.* 176.) But I think a different rule is now well established. (9 *Barb.* 366; 16 *id.* 556; 28 *id.* 633; 17 *id.* 157; 22 *N. Y.* 110; 22 *id.* 517; 24 *id.* 372.) These cases are not all directly in point, but by parity of reasoning they are conclusive of the question. In *Remsen* agt. *Nichols*, (22 *N. Y.* 110,) the court say that the effect of the laws of 1848 and 1849, is to place the separate property of a married woman entirely at her disposal during her life, with the right of disposition by will. But if she fail to make any disposition of it, and die intestate, the husband has all the rights given him by the common law and by the unrepealed provisions of the statute; and it was held that the separate personal estate of a married woman, who dies intestate, passed to her husband according to the rules of the common law. This is in affirmation of the decision in *Shumway* agt. *Cooper*, (16 *Barb.* 556,) where **ALLEN, J.**, says that the evident purpose of these acts was to secure to the wife the absolute enjoyment of her property, with the right to dispose of it by will or otherwise during her life; and he adds: "I see no reason to suppose that the legislature designed to interfere with its course

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after her death if she elected that it should go in the direction given it by law. The statute is for the personal benefit and security of the wife, and not of her kinsfolk." He adopts the opinion that if she omit to exercise her right of disposal, it would be good evidence of her intention that her husband should enjoy it after her decease according to the rules of the common law. I deem these views entirely sound. It is settled in the court of appeals that they control in regard to personal property, and they apply with equal propriety and potency to the wife's real estate left undisposed of at her decease. The right of tenancy by the courtesy still exists, notwithstanding the acts of 1848 and 1849, subject, however, to be defeated by the wife by any disposition of the property in her lifetime by deed or will. According to the allegations of the complaint, Abram Lansing had a life estate as tenant by the courtesy in the premises sought to be partitioned. But on the trial it was shown that he had parted with this right by deed of conveyance to Silas Shutts, prior to the commencement of the action. He therefore had no right to ask for partition, either alone or jointly with others, and the complaint must be dismissed as to him.

The other two plaintiffs are infants under the age of twenty-one years. Prior to the act of 1852 (*Sess. Laws of 1852, ch. 277, p. 411*) none but persons of full age could apply for partition. (2 *Rev. Stat.* 317, §1; also 329, §79; 13 *How.* 104; 4 *Sandy. Ch.* 508; 21 *How.* 479; 34 *Barb.* 106.) By this act (1852) the supreme court may authorize proceedings to be instituted on behalf of infants for a division and partition of their real estate held in joint tenancy or tenancy in common, but such authority shall not be given, nor shall a division or partition be directed by the court, unless it shall be made satisfactorily to appear that the interests of the infants require a partition or sale, and the court shall appoint a competent next friend to conduct the proceedings on the part of the infant, who shall be

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appointed upon like application and in like manner, and shall give such security and possess such powers as are specified and required on the appointment of guardians in actions for partition. These provisions have not been complied with. It is true an order was procured appointing Daniel Cameron the guardian of the infants to take charge of their interests, but this order, which is not even a formal compliance with the requirements of the law, was obtained on a petition of one of the infants, merely stating their infancy; that they were about to commence an action in partition, and had no general or testamentary guardian. This was an application under the Code of Procedure, as in ordinary cases, whereas the law requires other statements, formalities and proceedings when the action is to be for partition of real property. (*Secs. 1 and 2 of Laws of 1852, ch. 277; 13 How. 104; 15 id. 383; 21 id. 479.*) The law declares that authority to prosecute the action shall not be given unless it shall be made satisfactorily to appear that the interests of the infant require partition or sale. There was no attempt to comply with this provision, and the order appointing Mr. Cameron guardian is, as regards this statute, simply a nullity. The defect is more than formal: it is radical. In *Clark agt. Clark*, (21 How. 479,) the court discharged a purchaser under a decree of sale in partition because of the non-compliance with this provision of law, and directed the money paid on the purchase to be refunded. In *Lyle agt. Smith*, (13 How. 104,) it was held that there was no right or authority to commence the action until a next friend was appointed by the court pursuant to the act of 1852, who should give security as required by the Revised Statutes on appointment of a guardian for an infant in partition.

Again: section two of the act of 1852 declares that such authority shall not be given, *nor shall such division, partition or sale be directed by the court*, unless it shall be made satisfactorily to appear that the interests of the infant

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require such partition or sale. There is not now, and, so far as I can determine, there never has been any proof before the court to meet or answer the requirement of the law in this regard. The complaint must be dismissed also as to the infant plaintiffs, but without costs against them. I can, however, see no reason why Abram Lansing should not be charged with costs. As to him the complaint must be dismissed with costs.

The judgment must state that the dismissal of the complaint is without prejudice to the rights of the parties, or any of them, to the lands and premises, and without prejudice to any other or further action or proceeding in regard thereto.

Complaint dismissed.

NEW YORK COMMON PLEAS.

STEPHEN T. CLARK agt. JAMES BROOKS and others.

Under the act of 1840, the examination to obtain the deposition of an involuntary witness, on a motion in this court, must be taken before a *judge*; by the 401st section of the Code, as amended in 1862, such examination may be taken before a *referee*. The Code merely confers on the court an *additional power* to send the witness before a referee; but does not repeal or modify the act of 1840.

The Revised Statutes expressly authorize courts of record to punish for *contempt* "all persons summoned as witnesses, for refusing or neglecting to obey such summons, or to attend or be sworn or answer as such witness." And where the witness who attends before the court in pursuance of such mandate, and is *sworn*, the court has power to require him to *answer* proper questions, on pain of contempt, whether the *examination is conducted by the judge personally, or by counsel in his presence.*

New York Special Term, January, 1864.

MOTION by plaintiff for an attachment for contempt against a witness called on the part of the plaintiff, for refusing to testify in an action.

HENRY A. CRAM, *for motion.*

JOHN McKEON, *opposed.*

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CARDOZO, J. I have examined, as carefully as possible, within the brief interval since the argument, yesterday, the questions arising in this matter, and will proceed, though necessarily hastily and imperfectly, to express the results of my reflections.

I see no reason to hold that the Code (§ 401), as amended in 1862, repeals the act of 1840. It seems to me that the object of the Code was to confer on the court an additional power, which, without that section, it would not possess, to send the witness before a referee instead of having the examination conducted before a judge.

Under the act of 1840, the examination must be before the judge; by the Code, as amended, it might be taken before a referee.

The act of 1840 provides that when a motion is pending in this court, and the deposition of a witness who refuses to give it voluntarily, becomes requisite, the court may issue a summons requiring the witness to attend before one of the judges and make his deposition, and obedience to such summons may be enforced as in case of a subpoena issued by the court.

It is claimed by the respondent's counsel that I have no power except to enforce the attendance of the witness; and that the witness, having attended and been sworn, no matter what his subsequent conduct may be, I have no power to punish him. If this be so, the power conferred is a mere shadow, without a particle of substance. Indeed, practically, the statute would be inoperative, at least so far as any beneficial result to be attained is concerned. The witness in every case would only have to attend, be sworn, and then defy the court. I think this cannot have been the intention of the legislature, and is not a sound exposition of the statute. How can the judge be said to enforce obedience to a summons requiring the witness to attend before him, and not only to attend before him, but to make his deposition, if his power is exhausted the moment

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the witness appears. It is obedience to "such summons," *i. e.*, a summons requiring the witness to attend and make his deposition, which the judge is authorized to enforce as in case of a subpoena issued by the court. The moment the witness appears and is sworn, all the duties of a witness rest upon him, and all the powers of the judge over any witness come into existence.

Without entering upon an examination of the power of the court, independent of the Revised Statutes, it is sufficient to say that courts of record are by the statute expressly authorized to punish for contempt "all persons summoned as witnesses for refusing or neglecting to obey such summons, or to attend or be sworn or answer as such witness."

Mr. Hobson attended before me, and being duly sworn, proceeded to be examined in open court.

It was not necessary that I should personally conduct the examination. (*McDonald agt. Garrison*, 18 *How. P. R.* p. 249.) Several questions were put to him, each of which he refused to answer.

It is objected now that the witness should have been specifically directed by the court to answer some particular question addressed to him. Whatever may be the practice in that behalf, I do not regard that form as necessary as a jurisdictional matter. No doubt, where the refusal arose simply from a belief that a particular question was objectionable, that course would and should, as matter of practice, be adopted. But where, as in this case, the object of the refusal was to test the question of the power of the court—where the counsel for the witness had declared, in open court, that with a view of raising the question whether the act of 1840 was still in force, he would advise the witness to refuse to answer; of which, as it occurred before me, in open court, I may certainly take notice—it would seem that to have taken the course now insisted upon, although doubtless a very proper and dis-

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creet practice, would have been a very useless formula at least.

But, while I think the witness was bound to answer, and is amenable to the court for any willful refusal to testify, it appears that his refusal was based upon the advice of respectable counsel that he was not bound to answer—advice which, I have not the slightest reason to doubt, was given in good faith. I am unwilling that Mr. Hobson should be punished, because his counsel mistook the law. Under the circumstances, therefore, I will make an order that the witness attend forthwith and be examined, and that, in case he refuses so to do, on being served with a copy of the order, or in case he refuses to answer any proper question, an attachment issue.

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NEW YORK SUPERIOR COURT.

ANNIE McIVOR agt. JOHN H. McCABE.

The courts of this state have jurisdiction of actions for *personal injuries* inflicted in *any of the states* of the union, and are bound to entertain such action between citizens of those states.

New York Special Term, August, 1863.

MOTION to vacate order of arrest. The action is brought to recover for personal injuries. The injuries were inflicted in the state of New Jersey, while the parties were both residents of that state.

The motion to vacate the order of arrest is made upon the sole ground that this court has not jurisdiction of the cause of action.

R. H. HUNTLEY, *for the motion.*

EDWIN JAMES, *opposed.*

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MONELL, Justice. Except so far as the place of trial of actions for injuries to the person has been regulated by statutes (1 R. L. 325; 2 R. S. 409), such actions have always been regarded as transitory and triable in any county where the plaintiff might elect to bring his action; (*Co. Lit.* 282; *1 Wils.* 336) and it is not disputed that in this state an action of this nature may be tried in another and different county from the one in which the cause of action arose. But it is insisted that this is the limit of the jurisdiction, and that our courts cannot take cognizance of cases arising in a foreign country or neighboring state.

The common law jurisdiction of the superior court, except in its territorial limitation, is co-equal with that of the supreme court; hence any action which the latter court may entertain is triable in this court, provided the defendant resides, or can be served with process, within this county.

Every court is primarily the judge of its own jurisdictional powers, and may assume them or decline them, in the exercise of a sound discretion, in all cases, subject only to correction by an appellate court; and I am not aware that it has ever been held by any court, in any country, that there is any other controlling power.

Whether, therefore, the court will afford jurisdiction in cases of trespass occurring out of the state, may be said to rest in discretion merely, and may be denied whenever substantial justice may require it; but I have not been able to find any case (with a single exception) in which it is held that the courts may not entertain the action, irrespective of any question of injustice to the parties, and were bound to deny itself jurisdiction.

The cause of action in this case arose in the state of New Jersey, and there are courts in that state of competent power to afford the plaintiff redress for the wrongs and injuries she has suffered; and the convenience of both parties and witnesses would doubtless be promoted by a

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resort to the tribunals of that state. But the jurisdiction of the New Jersey courts is not exclusive, and the parties coming here may subject themselves to the process of our courts, and are liable in pecuniary damages, although the injury was done in the neighboring state.

So far as the acts of the defendant tended to a breach of the public peace, they were local, and cognizable only in the local courts; but the personal wrong to the plaintiff, for which she is entitled to redress, is transitory, and within the jurisdiction of our courts.

I cannot see any soundness in the argument that courts ought not, and therefore should not afford jurisdiction to this class of cases, merely because the tribunals of the country or state where the transaction occurred are ample to give redress. Such an argument may be addressed with force to the *discretion* of the court, where the resort to our courts may work great hardship and injustice to the party. But with ample power to procure the testimony of foreign witnesses, and to secure a fair and impartial trial, few cases could be suggested in which such an argument should prevail.

In this case, if jurisdiction rested in discretion merely, I could not upon this motion interfere with its exercise by the justice who granted the order of arrest, he having thereby determined that it was a proper case to be entertained by this court.

The question has frequently arisen in this state, and been decided with great uniformity, sustaining the jurisdiction in this class of cases. A brief review of some of the cases will exhibit the views entertained by our supreme court on the subject.

The earliest case is *Glen agt. Hedges*, (9 John. R. 67,) which arose in 1810. The action was trespass *vi et armis* for taking the plaintiff's slave out of plaintiff's possession. The trespass was committed in the state of Vermont. The question of jurisdiction was directly involved and raised. The court say: "There can be no objection to an action

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of trespass being brought here, though the act happened out of the state. The injury concerned the rights of personal property. The act was not a public offence, nor did it touch the rights of real property. It was of a transitory nature; and it is an established principle that such personal actions may be laid where the defendant is to be found."

In the next case of *Gardner* agt. *Thomas*, (14 *John. R.* 134,) the plaintiff and defendant were British subjects, and the injury was committed on the high seas on board of a British vessel, and the court entertained jurisdiction of the action, declaring that the courts of this state had concurrent jurisdiction with those of Great Britain, as to the private remedy.

In *Smith* agt. *Bull*, (17 *Wend.* 323,) the assault and battery was committed in the state of Pennsylvania, and a motion to non-suit on the ground that an action cannot be sustained here for an injury happening abroad, was denied, and the decision afterwards affirmed by the court in *baec.*

In *Lister* agt. *Wright*, (2 *Hill*, 320,) the action was for slanderous words spoken in *Canada*, and the jurisdiction was sustained. The learned Judge BRONSON suggests a doubt whether they *ought* to take cognizance of the action, if the parties were British subjects; but that question did not arise, as the parties were citizens of this state.

Wilson agt. *Mackenzie*, (7 *Hill*, 95,) went off on other grounds, but the court held to the rule laid down in *Gardner* agt. *Thomas*, *supra*, and sustained the jurisdiction against a strong appeal to the discretionary powers of the court, quoting from *SPENCER*, Ch. J., in *Percival* agt. *Hickey*, (18 *John. R.* 257,) that the court was not at liberty to assume or decline jurisdiction upon speculative grounds, or for reasons of public policy.

The rule is also fully recognized in *Beach* agt. *The Bay State Company* (27 *Barb. R.* 248).

The leading English case of *Fabrigas* agt. *Mostyn* (1 *Cowp.* 176) is cited as authority by all the judges in this state.

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Lord MANSFIELD there sustained the jurisdiction, although the transaction occurred in a foreign country, the parties being subjects of Great Britain. But the doubt suggested in the case put by his lordship, of two Frenchmen fighting in France, is seized upon as the expression of an opinion of that eminent jurist against the jurisdiction in such a case. He, however, assigns a reason for it, which relieves the case of all embarrassment. "Because," he says, "though it is not a criminal prosecution, it must be laid to be *against the peace of the King*; but the breach of the peace is merely local, though the trespass against the person is *transitory*." And YATES, J., in commenting on this reason, in *Gardner agt. Thomas (supra)*, says: "The objection to the jurisdiction, because it must be laid in the declaration to be against the peace of the people, is not sufficient; for that is mere matter of *form*, and not *traversable*."

In a very recent case in the English court of exchequer (*Scott agt. Lord Seymour*), published in the N. Y. Transcript of July 8, 1863, the jurisdiction was upheld. The action was for an assault and battery committed at Naples, where the plaintiff and defendant then resided. The question arose upon a demurrer to the plea setting forth the facts. The Lord Chief Baron, in deciding the demurrer, says: "It is *concluded by authority* that the circumstance of the assault and battery having been committed in a foreign country is in itself no impediment to an action being maintained for it here."

This case in its facts is like the one before me, and is conclusive of the view entertained at the present time on the subject by the English courts.

I was referred, on the argument, to the case of *Malony agt. Dowr* (8 Abb. 316), where the learned judge, after an elaborate review of the cases in England and in this country, arrives at the conclusion that jurisdiction cannot be entertained. The action was for personal injuries to the

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plaintiff in California, and the common pleas of this city nonsuited the plaintiff on the ground that they had no jurisdiction of the action. The heavy weight of authority in this state, in which the question has been carefully considered, would overwhelm any doubt which either the able argument of counsel or the opinion of the court, in the California case, might suggest. One of the errors into which, I think, the learned judge has fallen is, in regarding the parties to that action as foreigners, and not citizens of the United States. The doubt suggested by Lord MANSFIELD was in respect to the right of subjects of a *foreign* kingdom suing in their courts, not of their own subjects. And although perhaps no case may be found where *foreigners* have been allowed to resort to English courts to redress their wrongs committed in another country, numerous cases are found, and are of frequent occurrence, where the English subject is thus allowed.

Malony and Dows were *citizens* of the United States, and the transaction happened in one of those states. The cause of action was transitory, and, as it seems to me, upon well settled principles, was cognizable by the courts of this state.

The constitution of the United States (*art. 4, sec. 2*) provides that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. Hence Malony could claim the immunity of coming into our courts to get redress for the wrongs he suffered in California.

Another error of the learned judge, as I think, was in attaching too much importance to the right to give punitive damages for the breach of the public peace. The enhanced damages which are given by way of punishment for the public wrong are not compensatory to the public, which gets no part of them, but are designed to punish the offender, and goes with the other damages to the plaintiff. The public vindicates its rights by prosecution and convic-

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tion of the offender, and must resort to the local tribunals. The individual, who has suffered more than the offended laws, may avail himself of the immunities preserved to him by the constitution, and invoke other tribunals. The circumstance that the defendant may be punished for the public wrong does not make the private injury any the less transitory.

The conclusion to which I have arrived, upon a careful consideration and examination of this question is, that the courts of this state have jurisdiction of actions for personal injuries inflicted in any of the states of the Union, and are bound to entertain such action between citizens of those states.

As the parties to this action are both citizens, it is not necessary to determine whether foreigners have the same immunity.

The motion to discharge the order of arrest must be denied, with ten dollars costs.

SUPREME COURT.

THE BOARD OF TRUSTEES OF THE FIRE DEPARTMENT OF THE EASTERN DISTRICT OF THE CITY OF BROOKLYN, respond'ts
agt. JAMES ACKER, appellant.

An action to recover penalties by "The Board of Trustees of the Fire Department of the Eastern District of the City of Brooklyn," which are authorized to be brought in their own name, under the act of 1860 (*Lawe* 1860, ch. 472), must be brought in the *individual names of the trustees, with the addition of their name of office*—not by the designation of their official title merely.

Kings General Term, December, 1863.

BROWN, SCRUGHAM and LOTT, *Justices.*

THIS action was brought on for trial in the county court of Kings county, before Judge SAMUEL GARRISON and a jury, on the 10th day of December, 1862, on an appeal

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from a judgment of the justice's court of the fourth district of the city of Brooklyn, in favor of the above plaintiffs, against the defendant, for \$205.25 damages and costs. A copy of the complaint is as follows :

The plaintiffs in the above entitled action, who are the board of trustees of the fire department of the eastern district of the city of Brooklyn, show to this court :

First. That the defendant was, at the time of the several transactions hereinafter mentioned, and still is, the lessee of a certain piece of ground situated on the north side of South Eighth street, about ninety feet west of Fifth street, in said city of Brooklyn, or has some qualified or contingent interest therein by virtue of some agreement or contract in writing, or in some other manner ; and that as such lessee, or while holding such interest, and on or about the 20th day of May, 1862, said defendant erected a wooden or frame shed upon said premises.

Second. The said premises are situated within the fire limits of the eastern district of Brooklyn, as designated by the first section of chapter 472 of the Laws of 1860.

Third. That the erection of said shed is a violation of the 17th and 22d sections of said act, and that by said violation the said defendant forfeited to the plaintiffs, and the said plaintiffs became entitled to recover from the said defendant, the sum of \$1,000.

That after the erection of said shed, and on or about the 10th day of June, 1862, a notice in writing was duly served on said defendant by one of the fire wardens of said eastern district, notifying said defendant that the said shed or building was built in violation of said act, and requiring the said defendant to make such building to conform in all respects to the said act, within ten days from the service of said notice.

That notwithstanding the service of said notice and the lapse of ten days therefrom, the said defendant has not removed the said building from said premises, or made the

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same to conform to said act, but that he has suffered the said building to remain upon said premises in violation of said act for more than forty-eight hours after the expiration of said ten days, and still suffers the same so to remain thereon; whereby the said plaintiffs became and are entitled to recover of the said defendant the sum of fifty dollars for each twenty-four hours elapsed since the expiration of said ten days.

Wherefore the said plaintiffs claim judgment against the said defendant for the sum of \$200.

The defendant appeared personally without counsel and answered the complaint, orally denying each and every allegation in the complaint.

The plaintiffs introduced evidence sustaining the allegations set forth in the complaint, and presented and read in evidence chapter 304, Laws of 1857, incorporating "The Brooklyn Eastern District Fire Department," and providing for the organization of the board of trustees for said department; also chapter 472, Laws of 1860, establishing fire limits in the eastern district of the city of Brooklyn, and providing penalties for the violation thereof.

It was thereupon admitted by defendant that said fire department and said board of trustees had organized under said first named act, and said plaintiffs thereupon rested; whereupon the defendant moved that the complaint be dismissed on the ground: 1st. That the plaintiffs were not a corporation, and the act authorizing the plaintiffs to bring the suit in that respect was void, and therefore the suit could not be maintained in the plaintiffs' names. 2d. That the plaintiffs cannot sue and be sued.

His honor the judge overruled the motion, and the defendant duly excepted.

A verdict was subsequently rendered by the jury for \$200, in favor of the plaintiffs against the defendant.

A motion for a new trial was made on the judge's min-

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utes upon the points above presented and denied, from which order and judgment the defendant appealed.

C. M. BRIGGS, *for defendant and appellant.*

I. Can the action be maintained by the plaintiffs as a corporation?

1st. It is not alleged in the complaint that they are a corporation, and no evidence was given that they are.

2d. The acts cited as authority for this action show that the plaintiffs are not incorporated (*cl. 304 of Laws of 1857, and ch. 472 of Laws of 1860.*)

3d. By these it will be seen that the plaintiffs have none of the characteristics of a corporation.

a. They have not the right of succession.

b. Their organization and life depend on the existence of the corporation, officers of which plaintiffs are.

c. They have no seal.

d. If they can sue they cannot be sued. The one does not exist without the other.

e. They cannot hold real estate or convey; and if they can sue, they are without the power to enforce judgment by the purchase of property under execution.

f. Having no property they are not liable for costs.

II. Actions can be maintained by law only by persons, either natural or artificial.

1st. An action is a proceeding in a court of justice, by which a party prosecutes another party, (*vide Code, § 2.*)

2d. In actions a party is known as either plaintiff or defendant (*vide Code, § 70.*)

3d. A person only can be a party plaintiff or defendant (*vide Code, §§ 117, 118.*)

III. Section 29, of chapter 472 of Laws of 1860, is in conflict with the common and statute law, as above shown.

1st. No such intention of the law-makers can be gathered from the title of the act: "An Act to establish fire limits

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and for the more effectual prevention of fires in the eastern district of the city of Brooklyn." Such intention should be manifest. (*Wend.* 211 & 358; 2 *Hill*, 380; 15 *J. R.* 358.) A thing within the intention is as much within the statute as if it were within the letter; and a thing within the letter is not within the statute if contrary to the intention of it.

2d. No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title. (*Art.* 3, § 16, *Con.*)

3d. The constitution provides how corporations may be created (*art.* 8, § 1.) It also provides that all corporations shall have the right to sue and be subject to be sued (*art.* 8, § 3.) From this it is fairly inferable that the right and liability must exist together. The legislature cannot sever them, nor can they confer this right upon a mere formula of words.

4th. No association unincorporated within the meaning of the constitution can sue or be sued. (*Austin* agt. *Searing*, 16 *N.Y. R.* 112; *Waterville Manf. Co.* agt. *Bryan*, 14 *Barb.* 182.)

GEORGE THOMPSON, *for plaintiffs and respondents.*

The fire department of the late city of Williamsburgh was re-incorporated and re-organized in 1857, under the name of The Brooklyn Eastern District Fire Department. The act created a board of trustees, who were the managing financial officers of the department. By a law passed in 1860, fire limits were established and penalties provided, and the duty of collecting such penalties was imposed upon the plaintiffs. The defendant erected a wooden shed, upon a lot which he held, within such limits. An action was brought in a justice's court to recover the penalty, and a judgment obtained for the plaintiff. An appeal was taken to the county court, and a new judgment obtained. A motion for a new trial was made upon the minutes and

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denied. The appeal is, therefore, from the order denying a new trial. The appeal appears founded solely upon the ground of the want of capacity on the part of the plaintiffs to sue.

I. The acts of the legislature made ample provision for this action. Chapter 304, Laws of 1857, organizes The Brooklyn Eastern District Fire Department; section 7 of said act creates a board of trustees for said department, and makes it their duty to manage and invest the moneys belonging to the firemen's benevolent fund; case, fol. 16, admits organization of both, the fire department and board of trustees, under the act of 1857; chapter 472, section 1, Laws of 1860, establishes fire limits; section 17 forbids erection of wooden or frame shed in such limits; section 22 fixes the penalty for the violation of such act at \$100 for offence, and \$50 each twenty-four hours for failure to remove; section 29 authorizes the plaintiffs to sue in the name of the board.

II. There can be no constitutional difficulty in maintaining this action. Article 8, section 3, confers the right to sue, and imposes the liability to be sued upon all corporations. But it does not deprive all bodies, not being corporations, of the power to sue. On the contrary, by defining corporations, as including all associations having powers not possessed by individuals, it would seem to exclude the power of bringing suits from the distinctive powers of a corporation, as it is a power which corporations enjoy in common with individuals.

III. A legislative act would not affect this power when once granted, except by a subsequent repeal or modification. No such act has been passed.

IV. The precedents for acts of this kind are too numerous for citation. This power has been conferred upon corporate officials of every name and kind—single officers, and classes of officers, boards of excise, boards of police—town,

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city, county and state officers, bank presidents, and other officers of private corporations.

SCRUGHAM, Justice. The constitution gives to all corporations the right to sue, but the manner in which that right is to be exercised is left for legislative enactment; and there is no constitutional prohibition against a provision that it shall be in the name of one or more of the officers of the corporation.

The plaintiffs are not a corporation, but the trustees composing the board are officers of the Brooklyn Eastern District Fire Department, which was duly incorporated by the act of April 7th, 1857, and which is the legal owner of the fund for the use of which all recoveries are appropriated in actions for fines, forfeitures or penalties under the "Act to establish fire limits and for the more effectual prevention of fires in the eastern district of the city of Brooklyn," and therefore it is the real party in interest for whose immediate benefit such actions are prosecuted.

In providing that they shall be brought by the board of trustees, in their own name, the legislature only designates the officers of the corporation who are to sue in its behalf.

The difficulty in this case does not arise from any want of power in these officers to sue, but from the fact that the action does not appear to be brought by the officers, but by the office.

It has always been required that when the suit is by an officer for the benefit of the body he represents, it shall be brought in the proper name of the individual, with the addition of his name of office. (*Supervisor of Galway agt. Stimson, 4 Hill, 136; Commissioner of Highways of Cortlandville agt. Peck, 5 Hill, 215; The Agent of the State Prison at Mount Pleasant agt. Rikeman and Hubbell, 1 Denio, 279.*)

There is nothing in the act of 1860 indicating any intention of the legislature to establish a different rule in the actions which it authorizes; and the importance of requir-

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ing such actions to be brought in the individual names of the trustees, with the addition of their name of office, is apparent from the fact that otherwise, should they bring an unfounded action, no judgment for the defendant's costs could be collected, as the board of trustees have no property.

There is, on the other hand, no great hardship in requiring that the action should be brought in such a manner as to make the individual trustees liable for costs in case they fail to establish a cause of action. The suit is for a penalty which they are permitted to collect, but the enforcement of which is not incumbent upon them; they bring the action, therefore, voluntarily, and if they fail in it, it is no more than just that they should answer for the defendant's costs, and look for reimbursement to the corporation in whose interest they sued.

The county judge erred in denying the motion to dismiss the complaint, and the judgment should be reversed, and judgment ordered dismissing the complaint.

Justices BROWN and LOTT concurred in the opinion, but thought the decision should be that "the judgment be reversed and a new trial ordered—costs to abide the event," which was entered accordingly.

COURT OF APPEALS.

AMORY HOUGHTON agt. McAULIFFE & WHEELOCK.

Where a *promissory note* given to and payable to the order of an *insurance company*, is transferred before maturity to the *president* (by indorsement of the *secretary*), without any previous authority of the *board of directors*, as required by the statute relative to *moneyed corporations* (1 R. S. 598, § 51, L. 1844, 229, and L. 1855, 505), the *president* obtains no title to the note, and is subject to the penalties prescribed by the statute for such unlawful taking.

Such a note being the property of the company, and having been transferred or assigned unlawfully, it is *prima facie void* in the hands of an *assignee or holder*; and he must show that he purchased it for a valuable consideration and without notice of the facts which the statute declares render the transfer void and illegal, in order to sustain his action upon it.

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December Term, 1863.

THE defendants were makers of a note payable to the order of the International Insurance Company for \$1,000. P. J. Avery, the president of the company, obtained the possession of this and other notes to the amount of \$42,000, and the secretary of the company indorsed them to him. He subsequently procured from the finance committee a settlement or arrangement, by which they assented to the transfer. The plaintiff purchased this and other notes before maturity. Defendants refused to pay on the ground of illegality of the transfer.

Plaintiff claimed the statute prohibiting transfers did not apply, and if it did, that the company only, and not a debtor, could take advantage of it.

JOHN H. REYNOLDS, *for plaintiff.*

GILBERT DEAN, *for defendants.*

DAVIES, J. The note in controversy bears evidence upon its face that at the time of its negotiation it was the property of the insurance company. It contained the promise of the defendants to pay to the International Insurance Company, or order, the sum of one thousand dollars. This insurance company was made subject to the provisions of the statute relative to moneyed corporations (1 R. S. p. 598, § 51; *Laws of 1844*, p. 229, and 1855, p. 505; *Mutual Ins. Co. of Buffalo* agt. *Supervisors of Erie*, 4 Com. 444; *Brower* agt. *Harbeck*, 5 Seld. 589.)

By section eight of article one of the act relative to the insolvency of moneyed corporations (1 R. S. 591) it is declared that no assignment or transfer of any of the effects of such corporation exceeding in value the sum of one thousand dollars shall be made, which was not authorized by a previous resolution of its board of directors; and section ten declares, that any director, who shall violate or be concerned in violating any provision of the preced-

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ing section, shall be liable personally for any loss the corporation may sustain from such violation; and section eleven declares, that every director guilty of such violation, whether a loss shall or shall not result, shall be guilty of a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court. The note in suit, with others to a large amount, was never at any time assigned or transferred by the authority of the board of directors. They were taken by Avery, a director, under such circumstances as made such taking on his part a criminal offence. There was never any previous resolution of the board authorizing the taking of them by him, and he was, therefore, subject to the penalties prescribed by the statute for such unlawful taking. It seems hardly necessary to add that such illegal taking conferred no title upon him to the notes so taken and received by him (*Gillett agt. Phillips, 3 Kern.* 116). Having no title to the note in controversy, he could confer none upon any person taking the note from him, and it would, consequently, be void in the hands of all persons receiving it, unless they brought themselves within the exception of the last clause of the eighth section. This exception is, that the provisions of that section shall not be construed to render void the assignment or transfer in the hands of a purchaser for a valuable consideration and without notice. *Prima facie*, the note being the property of the company, and having been transferred or assigned unlawfully, it is void in the hands of the assignee or holder. If he wishes to relieve himself from the illegality which the statute has impressed upon the transaction, he must bring himself within the exception contained, by showing that he is a *bona fide* purchaser of this particular piece of property of the company. In other words, he must show that he purchased it for a valuable consideration, and without notice of the facts, which the statute declares render the transfer void and illegal. The plaintiff in this action has not done this, or made any

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attempt to do it. He does not adduce any state of facts or circumstances which show, or tend to show, that he stands in any better position than Avery himself in reference to this note. He cannot, therefore, maintain an action upon it.

The nonsuit was correctly granted, and the judgment thereon should be affirmed, with costs.

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NEW YORK SUPERIOR COURT.

ELLEN BURNS, by her guardian, **ELISHA W. CHESTER**, appellant agt. **CHAS. ERBEN** and **THOS. FROST**, respondents.

Where a *complaint* is susceptible of no other interpretation than a charge of *illegal arrest, detention and restraint of liberty*, the action is one of *false imprisonment* and not of malicious prosecution.

The Metropolitan police act allows the officers of police to *arrest persons suspected by them, without warrant*, where there is reason to believe a *felony* has been committed.

Where the plaintiff in an action for false imprisonment has, upon the evidence, recovered nominal damages against a police officer for arresting her on a charge of *felony*, the court on appeal will not interfere with the judgment.

New York General Term, January, 1864.

Before Justices MONCRIEF, ROBERTSON and MONELL.

THIS action was brought to recover damages for the alleged malicious arrest of the plaintiff. On the evening of the 6th of July, 1861, a quantity of silver, of the value of about \$200, belonging to the family of Mr. Henry Erben, was stolen from their dwelling house, 46 W. Thirty-eighth street, between the hours of eight and ten o'clock. The defendant, Charles Erben, is the son of Mr. Henry Erben, and at the time mentioned was residing with his father, at No. 46 West Thirty-eighth street. On that evening no stranger, other than Ellen Burns, was known to have been within said house. She came to the house about eight o'clock and left about half-past nine o'clock, about which

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time the commission of the felony was discovered. The silver was in a sideboard in the basement at the time she entered the house.

The testimony showed abundant opportunity for Ellen Burns to have admitted an accomplice, and afforded ground for the suspicion that the felony was committed by the plaintiff, or with her complicity. The defendant Frost, a member of the Metropolitan police force, attached to the twenty-ninth precinct, after personal investigation, at the dwelling house where the felony was committed, and by direction of his superior officer, arrested the plaintiff.

The defendant Erben accompanied the officer, but had no other participation in the arrest.

CHESTER & KENNADY, *for appellant.*

I. When the question arises on evidence as to probable cause or reasonable grounds of suspicion, it is the province of the jury to decide the facts under the charge of the court. (*Barb. Crim. L.* 544; *1 Nun. & Walsh*, 106; *Beckwith agt. Philby*, *6 Barn. & Cress.* 637.)

II. That in this case the want of reasonable grounds of suspicion was distinctly proved.

III. That the question is not here whether the officer had reasonable grounds of suspicion—he has confessed by his default that he has not—but whether the party who caused the arrest had. He had the means of knowing, and did know, from his own witness, that he had none.

(a.) The defendant Erben knew the plaintiff, and does not pretend that her character was not entirely above suspicion.

(b.) His own witness, Ann O'Connor, a girl living with him, stated that she had not taken the silver; that she had been with her all the time she was in the house, went out with her, and knew she had not taken it.

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(c.) The plaintiff's place of residence was known to the defendant Erben.

(d.) There were no facts to create suspicion. The simply being in the house at the time, or about the time the theft was committed, is not of itself a ground of suspicion, even if the facts had shown that she could have committed it.

(e.) The credibility of the witness is vouched for by Erben, by the fact of his producing her as a witness.

IV. The officer who acts upon a complaint may be justified, but the party who makes the complaint, if false, will be liable. (*Samuel agt. Payne, Doug. 359; Hobbs agt. Branscomb, 3 Camp. 419.*)

MATHEWS & SWAN, *for respondent Erben.*

OTIS D. SWAN, *of counsel.*

I. There being no dispute concerning the material facts in evidence, the question of probable cause was purely a question of law, and inasmuch as, upon the uncontradicted evidence in the case, there was a probable cause for the arrest of the plaintiff, the judge, who presided at the trial, was bound to nonsuit the plaintiff as to defendant Erben.

1. A felony had been committed. By express enactment a Metropolitan police officer has all the common law and statutory powers of a constable (*Laws of 1857, ch. 569, p. 200, § 8.*) The authority of a constable (and perhaps even a private individual,) (*Holley agt. Mix, 3 Wend. 350*) to arrest without warrant in cases of felony (and even upon suspicion that a felony had been committed, though it should subsequently appear that no felony had been committed), is fully established. (1 *Hale P. C.* 587: 5 *Dane's Abridgement*, 588; 1 *Chit. Cr. L.* 15, 17; *Beckwith agt. Philby, 6 B. and C.* 638; *Samuel agt. Payne, 1 Doug.* 359; *Davis agt. Russell, 5 Bing.* 354.) The question of the necessity for an immediate arrest is one to be determined by the officer, and

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not a question to be reviewed elsewhere (*Rohan* agt. *Savin*, 5 *Cush. R. P.* 281.)

2. When there is no dispute about facts, it is the duty of the court on the trial to apply the law to them. Probable cause is a mixed question of law and fact only when there is conflicting testimony in respect to the circumstances adduced to show the existence of probable cause. In the case at bar, there was no dispute about the material facts and no impeachment of witnesses. The plaintiff was nonsuited as to defendant Erben, because the cause of action alleged in the complaint was not established, viz: want of probable cause. (*Masten* agt. *Deyo*, 2 *Wend.* 424; *Buckley* agt. *Keteltas*, 2 *Seld.* 384; *Besson* agt. *Southard*, 6 *Seld.* 236; *Scott* agt. *Simpson*, 1 *Sand.* 601; *Rudd* agt. *Davis*, 3 *Hill*, 287, and approved on appeal, 7 *Hill*, 529.)

II. Assuming that defendant Erben participated in the arrest, by direction of the officer, his act was justifiable to the same extent as that of the officer (2 *Hibbard on Torts*, p. 454; *Payne* agt. *Green*, 10 *S. & M.* 507; *Elder* agt. *Morrison*, 10 *Wend.* 128; *Oystead* agt. *Sheil*, 12 *Mass. R.* 511.)

III. There was no evidence showing participation by defendant Erben in the arrest. He did not direct, advise, or request the arrest. He was a mere bystander, and was present when the arrest was made, merely by reason of his interest in the stolen property of his father.

IV. The exceptions having been directed to be heard in the first instance at the general term (*Code*, § 265), judgment absolute should now be ordered, with an allowance to the defendant Erben.

By the court, ROBERTSON, J. The language of the complaint is susceptible of no other interpretation than a charge of illegal arrest, detention and restraint of liberty. The action is one of false imprisonment, therefore, and not of malicious prosecution, which is a species of slander or libel, leading to peculiar injury, to wit: arrest by process of law.

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Undoubtedly in the latter case the plaintiff is to make out the negative, to wit: a want of probable cause, but slight evidence only is sufficient for the purpose. If the facts sworn to by the malicious prosecutor do not furnish *prima facie* grounds to infer that a crime has been committed, the magistrate issuing a warrant is guilty of false imprisonment.

The Metropolitan police act allows the officers of police to arrest persons suspected by them, without a warrant, where there is reason to believe a felony has been committed (*Laws of 1857*, § 8). A dangerous power, unless an immediate investigation is to be had by some magistrate. In this case a felony had been committed, and the plaintiff was arrested on the suspicions of a sergeant of police by the defendant Frost, who was a roundsman merely.

I do not find evidence enough to implicate the defendant Erben in the arrest. He merely disclosed what he knew, and only expressed an opinion that there was enough of suspicion against the defendant to have her examined. He did not request or urge any arrest, but left it to the officer at the station house to decide on its propriety. Nor did he make any charge. Such officer appeared to exercise the authority given him by law of arresting persons that he suspected.

The plaintiff has recovered against the officer nominal damages, which need not be interfered with, and the complaint was properly dismissed against the defendant Erben.

NEW YORK COMMON PLEAS.

STEPHEN T. CLARK agt. JAMES BROOKS and others.

On an *appeal* from an *order of sale and reference*, where a receiver has been appointed and has possession of the property, a *stay of proceedings pending the appeal* will be granted, where it appears the case is soon to be tried on the merits, when a reference may be dispensed with.

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New York Special Term, February, 1864.

MOTION by defendants to continue a stay of proceedings pending the appeal taken by them from the order of sale and reference made in this action.

JOHN McKEON, *for motion.*

HENRY A. CRAM, *opposed.*

CARDOZO, J. I think very much of the learned argument made before me may be laid out of view in determining this motion.

It will be best to defer considering whether the order appealed from be reviewable, until the question is presented at the general term.

I would only remark that while, certainly, there are very many instances where the decision of a judge rests so exclusively in his discretion that it cannot be appealed from, and ought not in any way to be reviewed, yet, in my judgment, the courts have strayed very far from true principles in the application of this rule to particular cases; and it may become necessary to retrace their steps.

There is one consideration which is of controlling influence, in my opinion, upon this motion. The case is soon to be tried on its merits, and the judgment which will then be rendered may, probably, entirely dispense with the contemplated reference—perhaps with any reference whatever.

To permit the reference mentioned in the order in question to proceed at present would be to allow an inquiry to be conducted, at considerable expense and labor, which may prove to be entirely valueless for any purpose of the case.

When a very brief time must decide whether any, and if any, what character of reference will be necessary, I do not think it proper to permit one of doubtful utility to be prosecuted.

I have not failed to consider the suggestions pressed with so much zeal and ability by the learned counsel for the

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plaintiff, as to the impropriety of the court, through receivers, conducting a newspaper of a political character (and I add whether political or otherwise) longer than is requisite to protect the interests of all parties. But as it has been conducted so long, I am not able to perceive that either the court, or the plaintiff, whose interest, it should be remembered, even on his own statement, is very trifling compared with that of the defendants, can be materially affected by its continuation for a short time longer, until the merits of the case can be decided.

Motion to continue stay granted—no costs to either party.

* * *

NEW YORK COMMON PLEAS.

ALEXANDER T. STEWART and others agt. LAFAYETTE RANNEY.

Where on a purchase of goods a third person guarantees the payment to a certain amount, *based upon a credit of six months from the dates of the respective purchases*, and where the dates of the several purchases are *averaged*, and notes of the purchaser are taken *dated on the average date*, whereby the term of credit is extended as to some items and diminished as to others, the guarantor is *discharged*. Though such method of averaging the account and taking notes may be an *established custom of trade*, such custom cannot render the guarantor liable, because the custom is in direct opposition to the terms of the guaranty.

The effect of customs of trade on commercial transactions stated and discussed.
(*This decision reverses S. C. at special term, 23 How. Pr. R. 205.*)

New York General Term, December, 1863.

DALY, BRADY and HILTON, Judges.

THE defendant, for a consideration, guaranteed to the plaintiffs the payment for all goods purchased of them after May 1st, 1858, by Martin L. Ranney, not exceeding \$500 in amount, and said Ranney to have a credit of six months from the date of the respective purchases.

Between May 20th and July 1st, 1858, six distinct purchases of goods were made upon the faith of this guaranty, based on the credit stated. On the latter day all these

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purchases were averaged as to dates and amounts, and a note given by Martin L. Ranney to the plaintiffs, dated June 11th, for the sum then owing, payable in six months. A similar course was adopted respecting five separate purchases made between September 4th and October 23d, 1858, the note being dated October 16th, and payable in six months. For two remaining purchases on November 2d and 11th no note was given. The whole amount of the purchases was \$915.14. Judgment was given for plaintiffs at the trial (*see 23 How. Pr. R. 205*), it having been proved under objection on the trial, that there is a custom in New York city among merchants to so average accounts, and that the defendant knew of this usage. The defendant duly appealed.

GEORGE R. THOMPSON, *for appellant.*

I. It is an unshaken principle of the law, that if the time of credit mentioned in the guaranty be either extended or shortened, the guarantor is discharged. (*Henderson agt. Marvin*, 11 *Abb. Pr. R.* 142; *Gates agt. McKee*, 3 *Kern.* 237; *Walroth agt. Thompson*, 14 *Wend.* 541; *S. C. 6 Hill*, 185; *Dobbins agt. Bradley*, 14 *Wend.* 435.) The only question in this case, then, is whether the usage in the city of New York, proved, controls this principle of law.

II. The objection to the admissibility of such evidence was well taken. The contract of guaranty in this case is express, that all purchases are to be based on a credit of six months from the dates thereof respectively. The word purchases being qualified by the word respectively, forbids any other construction than that the credit should run from the respective dates only.

(a.) It is perfectly well settled that a usage cannot control a contract when any contract is inconsistent with such a custom by its terms. (*Hinton agt. Locke*, 5 *Hill*, 437; *Vail agt. Rice*, 1 *Seld.* 156; *Walworth agt. Alcott*, 3 *Seld.* 65.)

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(b.) Especially is no custom admissible which the parties have seen fit expressly to exclude; and not only is a custom inadmissible which the parties have expressly excluded, but it is equally so if the parties have excluded it by a necessary implication, as by providing that the thing which the custom affects shall be done in any other way. For a custom can be no more set up against the clear intention of the parties than against their express agreement. (*Parsons on Contracts*, vol. 2, p. 59.)

(c.) We further insist that even had the guarantor and plaintiffs expressly agreed at the time of making the contract that an average note might be given, by parol, the evidence of it could not be proven in opposition to the terms of the agreement.

(d.) The definition of custom and usage is fully set forth and its application explained in 2d *Sumner*, 534, by Judge Story. He says, "I own myself no friend to the almost indiscriminate habit of late years of setting up particular usages or customs in almost all kinds of business and trade to control, vary or annul the general liabilities of parties under the common law as well as under the commercial law. It has long appeared to me that there is no small danger in admitting such loose and inconclusive usages and customs, often unknown to particular parties, and always liable to great misunderstandings and misinterpretations and abuses to outweigh the well known and well settled principles of law. And I rejoice to find that of late years the courts of law, both in England and America, have been disposed to narrow the limits of the operation of such usages and customs, and to discountenance any further extension of them. The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intentions of parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions and acts of a doubtful or equivocal character. It may also be admitted

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to ascertain the true meaning of a particular word, or of particular words in a given instrument, when the word or words have various senses—some common, some qualified and some technical, according to the subject matter to which they are applied. But I apprehend that it never can be proper to resort to any usage or custom to control or vary the positive stipulations in a written contract and *a fortiori* not in order to contradict them. An express contract of the parties is always, admissible to supersede or vary or control a usage or custom, for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled or varied, or contradicted by a usage or custom, for that would not only be to admit parol evidence to control, vary or contradict written contracts, but it would be to allow mere presumptions and implications, properly arising in the absence of any positive expressions of intention, to control, vary or contradict the most formal and deliberate written declarations of the parties." This authority is cited with approbation in *Hone agt. Mutual Ins. Co.* (1 *Sandf. S. C. R.* 137.)

III. It is evident that the custom proved in this case is in direct conflict with the terms of the guaranty.

IV. The case of *Smith agt. Dann*, (6 *Hill*, p. 543,) upon which the court below relies to sustain this judgment, is not applicable to this case.

(a.) There is no evidence in this case that the guarantor ever knew of the existence of any such custom. The custom is one not generally known, and one which the defendant could not be presumed to know. The custom in the case of *Smith agt. Dann* was not only a custom but a right given by law. All that is decided in that case is, that a mere change in the form of indebtedness from a running account to a promissory note, is that by that proceeding the makers of the notes gain three days grace, time within which to pay said indebtedness. It was evident in that case that there was no intention either to extend or shorten

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the time of credit, and BRONSON, J., expressly intimates that it was an oversight on the part of the plaintiffs in not cutting off the usual days of grace when they received the notes. The case at bar is quite different. Here the terms of credit were extended or shortened very considerably, and in direct conflict with the terms of the guaranty, and some time after the sales took place. In the case of *Smith agt. Dann* there was nothing in the guaranty in terms conflicting with the extension given by the plaintiff, and consequently the decision in that case does not apply. (See *Colemord agt. Lamb*, 15 *Wend.* 331.)

MALCOLM CAMPBELL, for respondents,

relied on the case of *Smith agt. Dann*, (6 *Hill*, 543,) and on the opinion below (23 *How. Pr. R.* 205).

By the court, BRADY, J. The claim against a guarantor is *strictissimi juris*, and the terms of the guarantee must be complied with. If the term of credit be longer or shorter than that named by him he is discharged. (*Walrath agt. Thompson*, 6 *Hill*, 540; *S. C. 2 Comst.* 185; *Leeds agt. Dunn*, 6 *Seld.* 469; *Henderson agt. Marvin*, 11 *Abb. Pr. R.* 142.)

There is but one exception to the adjudications in this state on that subject, that I have been able to find, and that is the case of *Smith agt. Dann*, (6 *Hill*, 543.)

The plaintiff in that case accepted the vendee's note for three months, which, being entitled to days of grace, extended the term beyond that named in the guaranty. Justice BRONSON declared the rule to be that guaranties, like other commercial contracts, must be construed with reference to the usages of trade, and that by usage a credit of three months, where a note was taken, included the days of grace. He admitted that the point had never been decided. It is a matter of some importance to ascertain to what extent the usages of trade are to enter into a con-

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tract, which is in itself clear and explicit—neither ambiguous in phraseology, nor requiring explanation by parol of any expression contained in it, and particularly when such usage relates not to the contracting party directly, but remotely, as in this case. Remotely, because the usage set up, which is to bind the defendant, is one affecting directly the relation of vendor and vendee, and entitling the former to average notes on a running account. Unless such a usage can be written over the signature of a guarantor, then the case of *Smith agt. Dann* has no general application, and must be confined to cases involving the same facts. There are two things to be said of that case. The first is that it stands alone. The second is that the credit given was the exact credit authorized, excluding the days of grace which custom gave to the debtor, and of which he could not be deprived save by express stipulation. The usage applied, it may also be said, was almost universal, governing promissory notes for whatever purpose given, and therefore one which every merchant must be supposed to have known. The usage relates, however, more to the mode of payment than to the credit given. If the goods had been sold on a credit of three months, and no notes had been given, no days of grace would have extended that credit an hour beyond the time named. The authorities, as already suggested, exact a strict compliance with the terms of the guaranty. Resort may, doubtless, be had to the usages of trade, to explain ambiguities, or the commercial meaning of a doubtful phrase, and the instrument is to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety, as said by C. J. THOMPSON in *Lee agt. Dick*, (10 Peters, 482.) None of these elements are necessary in this case. The guaranty is clear and explicit. Its terms are plain, and it is conceded that they have been departed from. It is true that the departure is said to be justified by the custom of

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averaging credits, but I do not think the rules governing guaranties can be said to allow the application of such a custom. I think, also, that this case does not fall within any general rule of construction which will warrant the addition of a clause to the defendant's contract. The case of *Smith agt. Dann* must, if these views be correct, be confined to a class of cases *sui generis*, and cannot have a general application.

The judgment should be reversed.

DALY, F. J., concurred.

HILTON, J., dissenting. I do not perceive the necessity of departing from the principle stated in *Smith agt. Dann*, a decision which has never been questioned before in any reported case.

I, therefore, adhere to the views stated in my opinion at special term, and think the judgment should be affirmed.

NEW YORK COMMON PLEAS.

STEPHEN T. CLARK agt. JAMES BROOKS and others.

Where, in an action between *partners* to settle copartnership matters, it becomes evident to the court, on examination of the issues, that the several interests of the parties will, on the trial, involve much contradiction—perhaps questions of veracity—of mistake or fraud in the drawing of the papers, &c., and is manifestly an inquiry which business men, accustomed to examine facts, should decide, the court will *direct the issues to be tried by a jury*.

And it is no objection to the granting of a proper application of this kind, that it is not made *within ten days after issue joined*, as provided by a *general rule* of the court. The court always deviates from the general rules whenever in its judgment a proper case is presented.

New York Special Term, February, 1864.

MOTION by defendants for a settlement of the issues in this action, and that they be tried by a jury.

JOHN McKEON, *for motion.*

HENRY A. CRAM, *opposed.*

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CARDOZO, J. Trial by jury is a favorite and a favored part of our judicial system. The semblance of an encroachment upon it is justly viewed with distrust and alarm. So great are the advantages which it possesses for ascertaining the truth, and so high is it in public regard and confidence, that, although equity cases are not within the section of the constitution which provides that the right of trial by jury shall remain inviolate forever, the court can hardly err when it resorts to that method of determining questions of fact. I do not think it proper, on this preliminary motion, to decide how far the claim of the defendants, that the stock transactions of the plaintiff are to be regarded as part of the partnership business, is well founded. That will properly arise when the facts are found, and the foundation for final judgment thereon shall be made. I refrain designedly from any further examination of that question than a mere reference to *Collyer on Part.* (§ 184 *et seq. and notes*).

Whether the interests of the parties are such as the plaintiff alleges or such as the defendants claim, is a question which I can well see will involve much contradiction—perhaps a question of veracity—a question of mistake or fraud in the drawing of papers—and is manifestly an inquiry which business men, accustomed to examine facts in the light in which people generally view them, rather than in the close method of judges and lawyers, should decide. On this I have not the slightest hesitation. For my own part, I shall always be only too glad to have the aid of the experience and intelligence of our juries in arriving at the truth upon disputed facts, whether they arise in common law or in equity actions. The law is properly the province of courts; the determination of controverted facts is peculiarly for a jury.

Unless, therefore, the other considerations urged by the learned counsel for the plaintiff, both of which range them-

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selves under the objection of delay, prevail, I shall grant the defendants' motion.

I think the objections should not deprive the defendants of the valuable right which they invoke.

Where there is a very heavy calendar, as in the supreme court, and the issues might have to stand a long time before they could be reached at the circuit, delay in making the application might reasonably be urged against it. But in this court, where there are almost constantly two trial terms, and the issues can speedily be tried, I think the objection does not possess much force. I do not overlook the ground upon which I granted a stay of proceedings some days ago, in one branch of this case.

I did, as the counsel for the plaintiff remarked, put that decision on the ground that the case could speedily be disposed of on the merits, and I reiterate that now. Only a brief interval will elapse before the issues can be tried, and certainly the law does not deprive one party of an important right in order to speed the other.

I do not think rule thirty-three, providing that either party, desiring a jury trial in cases of this description, shall make application within ten days after issue joined, presents any difficulty.

It was never heard that the court could not deviate from the general rules whenever in its judgment a proper case was presented. It is and always has been constantly done. A familiar instance is relieving parties against defaults taken for want of an affidavit of merits.

Indeed, the view of the plaintiff's counsel would give to time, in a rule of court, greater importance and rigidity than is generally ascribed to it when in a statute—when it is often construed as directory only.

Beyond this it is conceded, and such undoubtedly is the rule, and it has been acted on in a variety of instances, some of which are mentioned in *Van Santvoord's Eq. Pr.*, that on the hearing, the judge, if he deemed proper, even

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without motion, might refuse to try the action and send issues to a jury. If this be so, it will be difficult to see why it is any objection to granting this motion that it is made by a party to the suit before the trial has commenced. I think, however, that the issues proposed are not exactly right. I am willing, if desired, to hear counsel before settling them, as there was not much discussion on that subject before me. My present view is, that the first issue proposed is not in controversy, and is therefore unnecessary. The second is well enough, except that, if the first be disallowed, it will require a trifling change to make it intelligible. The third, I think, should be altered by striking out the inquiry how much profit the plaintiff derived—that will properly form the subject of a reference after the trial—and adding, did such trade or speculation deprive the partnership of any of the skill, industry or capital to which it was entitled, or did the same give the plaintiff an interest adverse to the partnership or his duty thereto?

I make these remarks as to the change of the proposed issues rather as suggestions than otherwise, without committing myself to them until the views of counsel are heard.

Motion to settle issues, and direct them to be tried by a jury, granted.

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SUPREME COURT.

CORNING agt. BEACH and others.

A *lessee and tenant* may *redeem*, by paying or tendering to the landlord the rent in arrear and costs in an action to re-enter for non-payment of rent, whether the action be at common law or under the statute, and may have an action in equity for that purpose.

The proceeding must, however, be taken within *six months* after execution executed on the judgment in ejectment.

A *judgment creditor* of the *tenant* may have an action for relief in equity after re-entry for non-payment of rent, and the leasehold interest will be sold for his benefit, provision being made for compensation and indemnity to the landlord.

This proceeding must be taken within *six months* after execution executed on the judgment in ejectment.

Saratoga Special Term, January, 1864.

THIS action is in equity to enforce the collection of a judgment held by the plaintiff against the real property formerly owned by Mary Christie, the judgment debtor, and now claimed by the defendant, Mary J. Beach.

The plaintiff, in 1860, recovered a judgment in this court for \$1,117.91, against Mary Christie, the payment of which she endeavored to evade. With that purpose, and prior to the recovery of the judgment, she conveyed her farm to Alexander S. Beach and wife. The plaintiff, on the return of execution unsatisfied, commenced an action to set aside the conveyance for fraud, and on the 27th of May, 1863, obtained a decree in the action declaring the conveyance from Mrs. Christie to Beach and wife, fraudulent as to the plaintiff and his judgment. In the meantime Beach and wife conveyed the premises to one Patten, and the latter conveyed to one Gallup; but both purchased during the pendency of the suit to set aside the conveyance to Beach and wife, and after notice of *lis pendens* was duly filed. Mary Christie died before the action to set aside the conveyance was tried, and the executor of her will was brought in upon a supplemental complaint and made a party defendant in the suit, by proper proceedings for

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that purpose. The interest of Mary Christie in the premises was a leasehold interest; and her conveyance to Beach and wife, and also the conveyance by them to Patten, and by him to Gallup, were made subject to the original lease from Daniel Campbell, as landlord, and reserved an annual rent of \$20, payable on the 25th March in each year. A short time prior to the trial of the action to set aside the deed from Mary Christie, Alexander S. Beach purchased the lease of Campbell, and soon after transferred it to his daughter, the defendant, Mary J. Beach, and the latter commenced an action against her father in ejectment for the non-payment of the rent according to the terms of the lease. He made no defence, nor did Gallup, under whom he pretended to occupy, and judgment was entered in favor of Mary J. Beach for the recovery of the premises, and on the 23d May, 1863, she was put in possession under a writ of possession issued on the judgment. The return of the writ showed that the costs of the suit were paid. The farm was worth about \$3,000, or \$200 a year.

G. G. SCOTT, *for plaintiff.*
J. ELLSWORTH, *for defendant.*

BOCKES, Justice. The judgment, declaring the conveyance by Mary Christie to Beach and wife, fraudulent and void as against the plaintiff, and his judgment overreached the title of Patten, inasmuch as he purchased and took title from them *pendente lite*, with notice of *lis pendens* duly filed. And for the same reason the judgment took effect upon Gallup's title also. The plaintiff's judgment against Mary Christie was therefore a valid subsisting lien on the premises when the defendant, Mary J. Beach, commenced her action under the Campbell lease for a re-entry, and continued a lien thereon until she obtained her judgment in such action. By such re-entry the legal title of Mary Christie, on which the plaintiff's judgment was a lien, was

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terminated, and Mary J. Beach had the legal title and possession under it. Still, a right to redeem by a proceeding in equity remained to the tenant—in this case to Gallup, who had succeeded to Mary Christie's title. This right to the tenant to redeem after re-entry for the non-payment of rent, after writ of possession executed, is denied by the defendant's counsel, and for the reason that the re-entry was at common law. But it will be found, on an examination of the old authorities, that proceedings to redeem by the tenant, after a common law re-entry and possession thereunder by the landlord, were allowed from the earliest times. (*Story's Eq. Jur.* sec. 1315, 1320, and *cases cited*; 1 *Hare's Ch. R.* 109, 128, 130.)

Prior to the act of 4 George II, chap. 28, the law court in which the suit was pending would interfere, on proper application, at any time before the landlord was put in actual possession under the judgment of re-entry, and would stay the landlord's proceedings on tender or payment into court by the tenant of the rent in arrear and all costs in the action. After that statute such relief could be obtained from the law court only, before trial or judgment. (11 *Metcalf*, 112; *see cases cited by court and counsel*; 7 *East.* 363.) Notwithstanding the remedy could not be had after judgment in the law court, still relief from the forfeiture could be obtained in equity. It was appropriate that the application should then be made in a court of equity, because of the necessity which would generally exist of making equitable conditions and provisions in regard to the landlord's enjoyment and use of the premises after re-entry; and, besides, courts of law had no power at common law to relieve against forfeitures after judgment executed therefor. Under our statute (2 R. S. 506, § 33) relief may be obtained from the court in which the action is pending, at any time within six months after possession shall have been taken by the landlord under the re-entry; and a remedy in equity is also given. (§ 36.)

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At common law the remedy of the tenant in equity continued so long as it remained in his power to offer the landlord complete and ample compensation; and this was deemed sufficient to entitle him to equitable relief. Mere lapse of time was not held to be an absolute bar. But the common law has been for many years controlled and limited in this regard by statute. The statute above cited (4 *George II*, c. 28) fixed the period within which the application should be made to six months after the landlord should be put in possession under the judgment of re-entry. In speaking of this act, Lord MANSFIELD is reported to have said that its "true end and professed intention was to take off from the landlord the inconvenience of his continuing always liable to an uncertainty of possession (from its remaining in the power of the tenant to offer him compensation at any time in order to found an application for relief in equity), and to limit and confine the tenant to six calendar months after execution executed, for his doing this; or else that the landlord should from thenceforth hold the demised premises discharged from the lease." (1 *Burr*, 619.) This act operated, therefore, as a statute of limitations as regards this class of actions, barring them unless brought within the period therein limited.

Our statute (2 R. S. 506) is very nearly a transcript from 4 *George II*. It provides that "the lessee or any person claiming any interest in such lease may, within six months after execution executed on such judgment in ejection, file his bill for relief in a court of equity, but not after that time; and if relieved in such court he shall hold and enjoy the demised premises, without any new lease thereof, according to the terms of the original demise." (§ 36.) This certainly does not take away any common law right, although it may limit the period within which the action might be brought, as did the English statute above cited. I am satisfied that the right to be relieved from the forfeiture, or right of redemption, as it is

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usually called, still remains to the tenant or lessee, and to every one claiming under him, after a re-entry at common law, even without the aid of our statute, which, however, as I think, also confers the right in all cases of re-entry for the non-payment of rent. But action for that purpose must now be taken within six months after possession shall have been given the landlord under the writ of possession.

In this case the plaintiff is not the lessee or tenant. He has no right to redeem as such. His is an equitable right to enforce his judgment against the interest of the former tenant in the premises—a pure equity, which cannot be enforced or made available by any proceeding at law. He cannot sell the right of the former tenant under execution on his judgment; for such right, after re-entry by the landlord, is but an equity. It is no longer a legal title, but a right to redeem, which may be exercised at any time within six months after the landlord was put in possession. And if the plaintiff could proceed at law, and sell under execution on his judgment, he could not obtain his title, under which to claim a redemption, short of fifteen months, and in the meantime his right of redemption would have passed. He therefore has no way by which he can secure his right or make it available except by an action in equity.

But has he any right as a judgment creditor of the tenant? It is but just that he should have—nor is it fair or equitable that he should be deprived of his property—in this case a judgment lien on real estate—through the negligence of the tenant, or, may be, through the collusive action of the landlord and tenant, with a view to destroy his claim. I think he is entitled to protection on general principles of equity and right. He has not done or suffered any act to the prejudice of his claim by virtue of his judgment lien; and he asks for nothing, except to be placed in a position where he may secure his demand by being permitted to take the place of the tenant and fulfil the obligations of the latter to the landlord. Of this the landlord

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cannot in justice complain ; and I think it is a case, in this view, for the interposition of a court of equity.

But, as I believe, the statute expressly confers the power on the court to extend to the plaintiff the relief demanded. It expressly preserves the right of the mortgagee of a leasehold interest against a re-entry, by declaring that he may, within six months after judgment and execution executed, pay all rent in arrear and all costs and charges, &c.; in which case he shall not be affected by the recovery. (§ 35.) The statute also declares that any person claiming any interest in such lease may, within six months after execution executed on such judgment in ejectment, file his bill for relief in a court of equity, but not after that time ; and, if relieved in such court, he shall hold and enjoy the demised premises, without any new lease thereof, according to the terms of the original demise. (§ 36.) As I have before intimated, I think this right existed at common law in case of a common law re-entry. I can see no reason for restricting the operation of this provision to cases of ejectment for non-payment of rent under the statute. The statute provides that in case the rent and arrears and full costs shall remain unpaid for six months after the execution issued upon "*any judgment in ejectment*" shall have been executed, the lessee and his assigns, &c. shall be barred and foreclosed from all relief, &c., and the landlord shall from thenceforth hold the demised premises free and discharged from such lease and demise. In the next section but one it is provided that any person claiming any interest in such lease may, within six months after execution executed on *such judgment in ejectment*, file his bill for relief, &c. What judgment ? On looking back, it will be found to refer to *any judgment in ejectment* mentioned in the previous section. Nor is there any reason why the right to file a bill for relief should not exist in all cases of judgments of re-entry for non-payment of rent. It can make no difference, as regards the equities of the parties,

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whether the proceeding in ejectment is at common law or under the statute; and I have no doubt that the provisions to which I have referred extend to all cases of judgments in ejectment for the non-payment of rent. So, in my judgment, the plaintiff is entitled to the relief demanded, both at common law and under the statute.

The next question is, how can the plaintiff's equitable right be worked out so as to make it available to him? It has been seen that his only remedy is in equity—that he has no right which can be enforced by proceedings at law. His remedy at law is exhausted. He cannot obtain relief by proceeding to sell in the ordinary way on execution issued or to be issued on his judgment. Equity will therefore lay hold of the case, and will work out the just result by an application of its own rules and means.

And first, what are the rights of the defendant Mary J. Beach, who has the position of landlord? She must have her rents, and also the costs and expenses of the suit for re-entry. As regards the costs, it seems that they have already been paid her. This appears from the return of the execution satisfied. It also appears that the value of the use and occupation of the premises by her, since she was put in possession, more than equals the rent in arrear. The rents and costs of re-entry are therefore satisfied to her. Now the plaintiff's rights come in to be answered. If the defendants, or any of them, will satisfy the plaintiff's judgment, they should be allowed to deal with the premises as they choose. If the tenant is willing to forego his right of redemption, very well. But the plaintiff must have the benefits of a sale of the leasehold interest, in case the defendants are unwilling to pay off and discharge his lien, which must still be deemed good in equity, notwithstanding the re-entry, as a basis for equitable relief. The premises must therefore be sold by the sheriff, on the usual notice of sale, unless the plaintiff's judgment be satisfied prior to the day of sale. The purchaser, in case of sale,

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will, however, hold the premises subject to the lease and according to the terms of the original demise. This will preserve to the parties their just rights.

It is said that the purchaser should not be let into possession short of fifteen months from the day of sale. But the premises should be made available to the plaintiff to their utmost value. Nor is there any reason for giving to the landlord fifteen months' use and occupation. The tenant has not availed himself of his right of redemption, and his rights of property are barred and foreclosed. The only parties now interested are the plaintiff and the party in occupation as landlord. The former has established his claim and right, which can be secured and enforced only by a sale of the premises under the decree of this court. Relief must be granted in the usual way of enforcing liens in chancery, by a sale, by the proper officer, on the usual notice, and the purchaser should be put in possession according to the practice of the court in cases of enforcing liens therein. The decree can be elaborated to meet the views here expressed.

The plaintiff is entitled to the costs of this action. The defendants resisted to the utmost the plaintiff's claim—compelled him to litigate—and they have failed totally on all the substantial portions of the defence. Besides, while I hold the re-entry regular, it is very plain that it was pursued with a view to deprive the plaintiff of all remedy on his demand. It is said that the plaintiff should have tendered the rent in arrear. Perhaps this suggestion would have been of some weight had the defendants not put their defence on other grounds.

They denied to the plaintiff any claim for relief. On this point it is enough to say, that all the material points of the defence are found to be unsubstantial.

Some other questions were discussed on the trial of the cause, which, in the view I have taken of the case, become immaterial.

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COURT OF APPEALS.

THE CHENANGO BRIDGE COMPANY, appellants agt. THE BINGHAMTON BRIDGE COMPANY, respondents.

In this case the opinion of the *court*, by Judge WRIGHT, preceded by the opinion of Judge SMITH, taking the same views, written in 1862, when the court were equally divided on the case, is published *ante* page 124. We now publish the opinion of Judge DENIO, written in 1862, taking an adverse view of the case, and also the dissenting opinion of Judge EMMOTT, written at the time of Judge WRIGHT's, in 1863, taking substantially the same grounds with Judge DENIO. A little reflection will show the vast importance of the questions involved in this case, especially when it is considered that the legislature, at each successive session, threw off in great profusion franchises to corporations and associations, without much apparent reflection upon the binding force they involve upon the state as well as upon those accepting the franchises.

Judge DENIO holds, in this case, upon the principal question, that the state, through the law-making power, contracted with the bridge company that if it would build and maintain the bridges in question, the law would not permit any other person to put up a bridge over the stream within two miles either way from such bridges. The chartering of another company, with authority to construct a bridge within that distance, was a *plain violation of the bargain*, and as it was a contract within the protection of the constitution of the United States, the *second charter was null and void*.

Judge EMMOTT holds that the 31st section of the act of 1805 confers upon the plaintiff two *distinct privileges*; one, that it should not be lawful for any person to have any other bridge or ferry within a certain distance of that authorised by the act; and the other, that it should not be lawful for any person to pass the bridge of the corporation *without paying toll*. These privileges are given in the same terms and in immediate succession. Both these grants must receive a similar construction. If the interpretation applied by the defendants to that part of the section forbidding the establishment of another bridge or ferry, be correct, the residue, which confers upon the plaintiffs the right and the power to exact tolls for the use of their bridge, must be construed in a similar manner. If the legislature are not forbidden by the clause now in question from authorising the construction of another bridge within the limit of two miles, they are equally at liberty to authorize any person to pass the plaintiffs' bridge without the payment of tolls. This would leave the most vital and valuable part of the plaintiffs' franchise, notwithstanding the impealability of the statute conferring it, wholly at the mercy of subsequent legislatures. It is a consequence which would hardly be contended for by any lawyer, and yet it is difficult to see how it could be escaped, if the principles of construction for which the defendants contend are to be adopted.

It seems clear that where the legislature agree that an act *shall not be lawful*, or *be done*, they agree that they will not do it, or make it lawful or permissible for others to do it.

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DENIO, Ch. J. (*dissenting*). The supreme court determined the case against the plaintiffs on the sole ground that there was no prohibition contained in the legislative enactments which constitute the plaintiffs' charter, against the erection of other bridges over the same stream and in the vicinity of their bridge. But that court was of the opinion, both at the special and the general term, that if the restriction contained in the charter of the Delaware Bridge Company had been incorporated into the plaintiffs' charter, it would have constituted a contract between the state and the corporators which would have been within the protection of the provisions of the constitution of the United States, which forbids the passage of any law by a state impairing the obligation of contracts; and the learned justice, who determined the case at the special term, has prepared an extended statement of the reasons for that opinion, in which I understand the general term substantially to concur.

We have recently had occasion to examine the same point in another case, where, although the case was decided on other grounds, we came to the conclusion that the legislature might, for the benefit of the corporators, annex to a grant, a corporate franchise, a restriction upon legislative power over a particular subject, which would bind the state, and all claiming under it, as constituting one of the terms of a contract which could not consistently with the federal constitution be impaired as to its obligatory effect by subsequent legislation. (*In the matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9.) In this class of cases, which involve questions arising under the constitution of the United States, we receive the matured judgments of the supreme court of the union as authentic evidence of the law, because it is the tribunal which the constitution itself has appointed to decide such questions; and our judgments are subject to review there, and to be reversed if they shall fail to conform to the law as there laid down.

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In a series of decisions, commencing with *Fletcher* agt. *Peck* (6 *Cranch*, 87), embracing *Dartmouth Coll.* agt. *Woodward* (4 *Wheat.* 518), and several other intermediate ones, and coming down to the modern cases of *The State Bank of Ohio* agt. *Knoop* (16 *How.* 369), and *Dodge* agt. *Woolsey* (18 *id.* 331), the doctrine is finally settled that a grant or other executed conveyance is a contract in the sense of the constitution; that grants and conveyances, made by means of statutes passed by the state legislatures, are equally within the constitution as private grants between individuals, and that a state may, by means of a grant effected by a public statute, impose restraints upon the law-making power; which restraints it is not within its competency to abrogate by a subsequent statute. The cases referred to, from *Howard's Reports*, are striking examples of restrictions upon the power of taxation, over particular subjects, effected by statutes granting corporate franchises, but which, as it was held, the state could not by any subsequent act of legislation remove. (See, also, *The Ohio Life & Trust Co.* agt. *Debolts*, 16 *How.* 477, per *TANEY, C. J.*) The force of this course of decision is not at all weakened by the judgment in the case of *The Charles River Bridge* agt. *The Warren Bridge* (11 *Peters*, 420), in which, though it was held that the exclusive right claimed by the plaintiffs could not be sustained, the decision was placed wholly upon the ground that the plaintiffs' charter did not, by its terms, or by any allowable implication, forbid the legislature from authorizing the establishment of another bridge. The opinion of the court, pronounced by Mr. Chief Justice *TANEY*, proceeds throughout on the assumption that the legislature of Massachusetts was competent to bind itself to an engagement against the erection of another toll bridge, and insists only that, in the case before it, it had not done so. The case may contain doctrines in respect to the construction of statutes applicable to the present case, but it plainly concedes that where, in the

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charter of a bridge company, there is an explicit prohibition against establishing another bridge, it is binding upon the state, and the obligation cannot be renounced by succeeding legislatures. The doctrine has recently been re-asserted in the supreme judicial court of Massachusetts, in the case in which the charter of an early railroad company contained a provision that no other railroad than the one thereby granted should, within thirty years after the passage of the act, be authorized to be made upon the same route. Charters were subsequently granted by the legislature to several railroad corporations, which, together, authorized a line of railroad nearly corresponding with the plaintiffs' road. The court, after hearing an elaborate argument, and by a carefully prepared opinion by the late Chief Justice Shaw, decided in favor of the plaintiffs' claim to an exclusive right, and gave judgment for an injunction against operating the defendants' roads.

The most serious question, therefore, in the present case, is whether the prohibition against constructing other bridges within a distance of two miles *is a part of the charter* of the Chenango Bridge Company.

It will be seen that the act of 1805, provides for the incorporation of two separate bridge companies, one of which was to be called The President & Directors of the Delaware Bridge Company, and to have for its object the erection of a bridge across each of the two branches of the Delaware river, where the turnpike road passed over them; and the other to be called "The Susquehannah Bridge Company," for the construction of two other bridges, to be laid across the Susquehannah and the Chenango rivers respectively, at points indicated. The series of provisions respecting these companies, is introduced by a very significant *preamble*. It sets forth an *urgent* public necessity for these bridges, by declaring in effect that the motives which led to the incorporation of the turnpike roads, provided for in the same act, cannot be carried into full effect, or

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the public convenience promoted without the bridges. It then sets out the necessity which is thought to exist of extending extraordinary encouragement to the enterprise, on account of the difficulty of the work, its exposure to injury from sudden freshets, and the probability that "a frequent renewal of the whole capital," will be required to secure permanent and durable bridges. This recital is introductory of and applies equally to the subsequent provisions respecting each of the bridge companies, and is therefore as applicable, so far as appears, to the bridge over the Chenango, as to either of the others. Its object is to explain the reason for offering the peculiar inducements which are held out to encourage parties to undertake the several enterprises, in order that those who might in future years be called upon to expound the act may understand the motives which led to its enactment. These inducements consist in the rates of toll allowed to be taken, the duration of the charters, and especially, as it seems to all, in the provision for securing the corporators against interference with the franchises granted, by the establishment of ferries or the erection of competing bridges. As these inducements were, so far as the act discloses, equally necessary to promote the erection of each of the bridges, there is no reason, *a priori*, for supposing that the Chenango bridge was not as fully within the intention of the legislature in offering them as either of the other three bridges. We are to look also into the system upon which the several detailed provisions are framed and adjusted to the two corporations, and the scheme was this: to provide in the outset for the formation of one of the corporations (the Delaware Company being chosen), and to attach primarily to that one all the provisions and regulations which it was thought expedient to enact respecting both companies, and then to provide for the incorporation of the other company, and to adopt these provisions and regulations to that corporation by

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brief words of reference. The act is obviously drawn in conformity to this system. Among the special provisions, which are numerous and are set down in great minuteness of detail, employing some fifteen sections, is that one which declares that it shall not be lawful for any person to erect any bridge or establish any ferry *across the said west and east branches of the Delaware river*, within two miles either above or below the bridges to be erected and maintained in pursuance of the act. The Delaware Bridge Company being thus fully constituted, the Susquehannah Company is then provided for in a single section. The location of the two bridges to be constructed by that company is fixed and the name of the corporation is stated; and the section then proceeds to declare that the said Susquehannah Bridge Company, and their successors and assigns shall and may have perpetual succession, and shall be and hereby are invested with all and singular the powers, rights, privileges, immunities and advantages, and shall be subject to all the duties, regulations, restraints and penalties which are contained in the foregoing incorporation of the Delaware Bridge Company, and it declares that all and singular the provisions, sections and clauses thereof, not inconsistent with the particular provisions herein contained, shall be and hereby are fully extended to the president and directors of this incorporation. The section then provides for commissioners to open the books of subscription to the stock, and for the rate of tolls, which are to be the same for the bridge over the Chenango river, as are provided respecting one of the bridges of the Delaware company, and for the bridge over the Susquehannah, one-third more; and this is all which is said respecting this company. The intention of giving to the two companies precisely the same faculties, and of making them, as far as possible, exactly similar, in all respects, is very apparent. The draftsman was assiduous in bringing together a great many words to express that intention, and

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was apparently fearful that some ingenious criticiser would find grounds to distinguish between them contrary to what he intended. Now as these charters were designed to continue for thirty years, and could not be expected to be immediately profitable, the provision forbidding competition must have been regarded as of great importance. The adventurers must necessarily look to the future for their reimbursement for the outlay which they must immediately incur, but in order to rely upon that resource, they, we may suppose, required a guaranty against other competitors for the profits of the transit across the river, which the increase of population, and the opening of the country to settlements were expected to bring. Such a guaranty was inserted in very explicit language, in the provisions respecting the bridges spanning the Delaware. If that guaranty is not also applied to the bridges of the other company, it was undoubtedly owing to an accidental omission, the motives for attaching it to *these bridges being equally cogent* as in the case of those crossing the Delaware, and the general intention to give each of the companies a charter exactly similar being, as has been mentioned, abundantly apparent. With this general outline of the statutes, we are prepared to examine the particular words of reference by which the restraint in question is supposed to be engrafted upon the charter of the Susquehannah Bridge Company. That company is invested with all the *rights, privileges, immunities and advantages of the Delaware company*. If the language of the provision respecting that company had been that no person should erect a bridge or establish a ferry within two miles either up stream or down stream from the bridges erected by them, this power of excluding competition would have been a right and a privilege, and moreover an immunity and an advantage, which, beyond all question, would have been annexed to the Susquehannah company equally with the Delaware company. But the prohibition is, in terms,

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against erecting a bridge across either of the branches of the Delaware river within the prescribed distance ; and it is *because the streams of water are named*, that it is argued that the prohibition cannot be applied by the words of reference which are used to the bridges over the other streams. It is very true that a provision incorporated into the Susquehannah charter, that bridges should not be erected over the Delaware river would be idle and absurd. But I am of opinion that the construction contended for by the defendants would be too narrow and literal. It was, I think, the substance of the provisions in the first mentioned charter, as distinguished from the verbal phraseology, which was to be imported by means of the words of reference, into the other. Reasonable consideration should be given to the theory on which the act was framed. The form adopted was resorted to in order to avoid tedious repetition, but great care was taken that no provision relating to the former company should be left out in the other. This is obvious from the further language of the section, as all the rights, privileges, &c., of the Delaware company were conferred upon the other, the latter, was also charged, as was manifestly just, with all the duties, restraints and penalties which had been enacted respecting the first named company ; and for abundant, if not by excessive caution, it was added that all the provisions, sections and clauses of the Delaware charter, not inconsistent with the particular provisions contained in the act should be "fully extended" to the Susquehannah company. The substance of the provision against competition was not at all inconsistent with anything contained in the act, but was perfectly homogeneous with the scope and intention. A literal construction which should shut out from the Susquehannah charter all the provisions primarily annexed to the incorporation of the Delaware company, which could not be transplanted in *haec verba* into the other would quite subvert the intentions of the

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legislature. The act gives, in quotation marks, the form of the subscription paper to the stock; and the promise contained in it is "to pay the sums subscribed to the president and directors of the Delaware Bridge Company." It would of course be absurd to use such a paper for obtaining subscriptions to the stock of the Susquehannah company. Then the provision for inspection requires the official action of the judges of the court of common pleas of the county of Delaware; and yet it is preposterous to suppose that they were to go out of their own county to inspect the bridges at Chenango point while there were judges of the same grade in the proper county. So in regard to the directions for publishing notices of the meeting of the stockholders to choose directors. They are adjusted to the locality of the Delaware bridges, and would have to be accommodated to the other locality, or they could not be used.

It is argued by the defendants' counsel that settled rules of interpretation forbid a liberal construction of statutes of the character of that under consideration. If by such a construction is meant the giving a statute a scope beyond the language, for the purpose of embracing cases of a similar character with those provided for in terms, by means of what is called an equitable construction, I admit that such an interpretation cannot be given to a statute like this one which does, upon the plaintiffs, prohibit what would otherwise be a matter of right. It is no doubt of the class of enactments which the courts ought not to interpret in equity as is shown by the cases to which the defendants' counsel have referred. The most permanent one is *The Stonebridge Canal Company agt. Wheeley* (2 *Barn. & Adol.*, 792). The proprietors of a canal constructed pursuant to an act of parliament, were authorized to exact certain tolls upon every ton of goods in boats navigated on any part of the canal, *and which should pass through one or more of the locks*. A portion of the

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canal was capable of being navigated without the necessity of passing through any of the locks, but it was held that toll could not be exacted unless there was an actual passage through a lock. The case was not within the letter, though it was, perhaps, within the equity of the acts, but in such a case an equitable construction was not admissible. In the present case I think the prohibition respecting other bridges is imported into the Susquehannah corporation by the very words used by the legislature. They are broad enough to embrace the substance and real meaning of the provision. The only question is one of intention, and I have already stated my reasons for thinking that there was a plain design on the part of the legislature that the two corporations should be precisely alike in this, as well as in all other particulars, except the different points at which the bridges were to be erected.

But it is argued on behalf of the defendants that the prohibition against the erection of other bridges, even if it is incorporated into the Susquehannah charter, does not disable the legislature from passing a law authorizing other bridges to be erected, but that it is only a restraint upon unauthorized individuals. In determining this point, we must keep in mind that the provision against competing bridges is one of the terms of a contract between the corporators and the state. That the legislature acting in behalf of, and fully representing the state, and being the law-making power of the state, was virtually the party bound by the prohibition, and that the object of inserting it in the act was to secure to the adventurers a more certain provision for the reimbursement of the moneys which they would have to expend in constructing the bridges. If the legislature was competent to license another association of adventurers to build competing bridges at a considerable distance of time, but within the continuance of the charter, they could do so at any earlier period, or as soon as the first bridges were constructed; and if they

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could license others by granting to them an act of incorporation *a fortiori* they could erect a *free state bridge*, and thus remove all obstructions to the passage of the river otherwise than upon the plaintiffs' bridge. I think such a construction would do great violence to the meaning of the contract. The legislature must be understood to have offered to the parties proposing to erect the bridge that they should receive a toll at the rates mentioned in the act, and that they should not be subject to be interfered with or diminished by competing bridges erected within the prescribed distance. Such is the *substance* of the undertaking on the part of the public. If the legislature was left free to construct bridges themselves, or to license others to do so, the provision would be wholly illusory. We can have no idea of a contract where one of the parties only is bound, or of a contract annexed to a grant which may be renounced by one of the parties as soon as it was made.

The position of the defendants' counsel does, at first view, appear to derive some support from the case of *Thompson agt. The New York & Harlem Railroad Company* (3 Sand. Ch. R. 625, 659). In that case the plaintiffs' toll bridge across the Harlem river was erected pursuant to an act of the legislature which contained a prohibition, in terms, very similar to that which we are considering; and the violation of their rights of which the plaintiffs complained was the passing of the Harlem railroad across the river by means of a bridge. The learned Vice-Chancellor (SANDFORD) declared that this was not such an interference as was contemplated by the prohibitory provision, a railroad bridge being, as he conceived, incapable of being used for the passage of any vehicle, animal, or foot passenger, for whose passage the proprietors of the chartered bridge were entitled to receive toll. He added, in effect, that if the progressive spirit of the age had developed and matured a mode of conveying passengers and

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freights from place to place, across rivers and over morasses [?] which was unknown when the act chartering the plaintiffs' bridge was enacted, that there could be no doubt that the legislature, in the exercise of its sovereign duty to provide ways for the use of the people, might authorize the construction and use of such new invention, although the necessary consequence might be that the former mode of conveyance would be superseded, and that those who were profitably engaged in their pursuits would be subjected to the loss of their business and capital. I entirely concur in this view, and consider it quite sufficient for the decision in that case in favor of the defendant. The same point had been decided the same way by Chancellor WALWORTH in *The Mohawk Bridge Company agt. The Utica & Schenectady Railroad Co.* (6 Paige, 554). But the vice-chancellor in the Harlem railroad case, in addition to the satisfactory ground for his judgment which I have mentioned, remarked that the act chartering the plaintiffs' bridge did not declare that the legislature might not *permit* another bridge to be erected. Indeed, he added, the declaration inserted in the second section (the prohibitory clause) was evidently aimed at the rights which it was supposed the inhabitants of Morrisania and Harlem might claim under their old patent, rather than by [?] any interference by others with the franchise granted to the bridge company. As to all persons other than the inhabitants of Morrisania and Harlem such a provision was wholly unnecessary, because no one could set up a toll bridge or ferry without authority from the state. In the present case the prohibitory declaration was intended, beyond all doubt, to prevent the interference of other persons with the company's franchise, and if the facts in the Harlem case proved, as the learned vice-chancellor stated, that other motives and other objects were aimed at by the corresponding provision in that case, it would be no precedent for the present one, if there had not been another objec-

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tion upon which the decision might turn, and if the case were esteemed a binding authority.

To state my conclusion on this part of the case in a few words: The state, through the law-making power, contracted with the bridge company that if it would build and maintain the bridges in question, the law would not permit any other person to put up a bridge over the stream within two miles either way from such bridges. The chartering of another company with authority to construct a bridge within that distance was a plain violation of the bargain, and as it was a contract within the protection of the constitution of the United States, the second charter was null and void.

The act of 1808 (*ch. 119*) divides the Susquehannah company into two companies, one of which was to retain the name of the Susquehannah Bridge Company, and to be limited to erecting and maintaining the bridge across the Susquehannah river under all the provisions of the charter given to that company by the act of 1805, except the limitation of its duration for thirty years (which limitation was expressly repealed); and by the next section of the act, the other company, which is the plaintiff in this suit, was to be called "The Chenango Bridge Company," and to have for its object the erecting and maintaining the bridge now in question over the Chenango river, and it was to be a corporation with perpetual succession "under all the provisions, regulations, restricting clauses and provisions of the before-mentioned Susquehannah Bridge Company." There is no difficulty of the character of that supposed to exist in the former case, in giving full effect to this mode of reference. After giving the Susquehannah Bridge Company an unlimited charter and all the faculties and incidents which it had under the act of 1805, it incorporates the Chenango company and endows it with the same precise rights, faculties and incidents.

Under this act the plaintiffs' bridge was built, and they

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claim for it the rights intended to be secured to them by the legislative provisions enacted in its favor. I think we are obliged by the law to protect them in the enjoyment of those rights.

It is probably true that the condition of the country has so far changed that the public convenience requires further accommodation for crossing the river at this point than plaintiffs' bridge affords. This may show that the legislative acts which we have been examining were improvidently passed. But the men of that day thought otherwise. Whether the present state of material progress in that section of country has been accelerated to any extent, or if it has, to what extent, by the expenditures of the plaintiffs' corporation, it is impossible to say, nor can we determine whether less encouragement than was given would have accomplished equal results. We are only concerned to determine accurately what the precise terms of the legislative contract are and to give them effect. The circumstances of this case may lead to doubt in some minds whether the series of adjudications which has attributed to legislative acts, of this character, the force of contracts, within the constitutional provision, was upon the whole wise and legally sound. Cases may certainly be presented, if this is not one, where we may think that the private interest of the corporators ought to be forced to give way to the public good. But after a uniform course of decision of the court of last resort upon such questions, upon this precise point, extending over more than half a century, a court possessing only a subordinate jurisdiction upon this class of subjects can not be expected at this day to depart from the old and strike out a new path.

It is not for us to determine in this action whether the franchise possessed by the plaintiffs is subject to the exercise of the right of eminent domain residing in the government of the state. For myself I cannot see how propri-

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tary rights acquired under such a contract should be more sacred than other property which a citizen or a corporation may possess, and such I understand to have been the judgment of the courts where the question has arisen. (*West River Bridge* agt. *Dix*, 6 *How.* 507; *Richmond, &c. Railroad* agt. *Louisa Railroad*, 13 *id.* 83; *Boston, &c. Railroad Company* agt. *Salem Railroad Company*, 2 *Gray.* 1). But it will be time enough to consider this question when it shall arise.

The result of these views is that the judgment appealed from should be reversed and judgment entered for a perpetual injunction against the maintenance of the defendants' bridge across the Chenango river.

EMOTT, J. (dissenting). That the Chenango Bridge Co., which was created by act of the legislature passed April 1st, 1808, became vested with all the rights and privileges which had been previously conferred upon the Susquehannah Bridge Company by the 30th section of the act of April 6th, 1805, is sufficiently plain to need but little argument or remark. By the act of 1805 the Susquehannah Bridge Company was incorporated for the purpose of building a bridge over the Susquehannah river near what was then known as Oquago in the county of Tioga, and also another bridge across the Chenango river at Chenango Point, where the village of Binghamton has since grown up. The act of 1808 divided as it were the corporation into two. Its original capital was \$20,000, and it was authorized, as I have mentioned, to erect and maintain two bridges, one over each of the rivers specified. It was now restricted under its original name and corporation to the building and maintaining one of the bridges which were included within the original design, that over the Susquehannah river, and its capital was reduced to \$10,000, one-half of the original amount. At the same time its stockholders, with any others who might associate with

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them, were created a new body corporate under the name of the Chenango Bridge Company, with the power and right exclusive of the parent organization to build and maintain the Chenango bridge. The remaining \$10,000, or one-half of the capital originally authorized, was set apart and designated as the capital of the new corporation, and the corporation was declared to exist under all the provisions, regulations, restrictions, clauses and provisions, of the Susquehannah Bridge Company's charter. The obvious meaning and the effect of this was to create a new corporation with all the powers, duties and liabilities which attached to that from which it sprang, at the time of its creation, subject only to such modifications or interpretations of those powers as would be incident to the distinct object of the new company. It is contended that this did not confer upon the appellants the powers and privileges which were given to the Susquehannah company by the act of 1808 itself, but only such as belonged to the latter by its original charter, and before the passage of the act which divided the original company into two corporations. But this would be a narrow and an unreasonable construction of the act. The legislature incorporated the Susquehannah company anew in 1808, changing materially not only the object but the conditions and character of its existence, and it at the same time chartered the Chenango Bridge Company for a purpose which had been included within the design of the original charter of the Susquehannah Company, but was now excluded from its powers. It would not be contended that *both* companies were authorized to bridge the Chenango river, or that the new company had any right to bridge the Susquehannah. The act of 1808 in conferring upon the Chenango company the same rights as were possessed by the before mentioned Susquehannah Bridge Company, referred to the amended corporation which was the creation or result of the amendment made in the original charter of that com-

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pany by the act itself. It is the Susquehannah Bridge Company then and there created and referred to in the act itself whose powers and privileges are conferred *mutatis mutandis* upon the Chenango Bridge Company. It does not, therefore, admit of any doubt to my mind that the Chenango Bridge Company has perpetual succession without the limitation of 30 years, which was originally imposed upon the parent company, but was removed by the act of 1808, and that the Chenango bridge might be built at any time within four years from the passage of this act instead of being required to be completed by the 1st of December, 1809, which was required of the Delaware bridges, and as it is contended if not conceded of the Susquehannah bridge in like manner by the act of 1805.

As the next step in the present discussion we must go back and examine the effect of the two statutes of 1805 and 1808 upon the Susquehannah Bridge Company, and especially the construction of the 38th section of the former statute in reference to the privileges of that corporation. The act of 1805 incorporated the Delaware Bridge Company with specific and enumerated powers, privileges and restrictions, and with all necessary regulations for its corporate existence and management. Then the 38th section of the act created the Susquehannah Bridge Company, and invested it with "all and singular the powers, rights, privileges, immunities and advantages, and declared that it shall be subject to all the duties, regulations, restraints and penalties which are contained in the foregoing incorporation of the Delaware Bridge Company, and adds that all and singular the provisions, sections and clauses thereof, not inconsistent with the particular provisions herein contained, shall be and hereby are fully extended to the president and directors of this incorporation. This single section of the act is the entire charter of the Susquehanna company, and it contains nothing beside the provisions which I have quoted, except a designa-

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tion of commissioners to receive subscriptions to the stock, and regulations as to the toll on each of the bridges which the company were originally authorized to build, that is, the Susquehannah and the Chenango bridges respectively. It is very plain that the charter of the Susquehannah Bridge Company was the law incorporating the Delaware Bridge Company applied to the first named corporation, and modified if necessary to adapt it to its circumstances and design. The language conferring upon the one the powers and duties of the other is as full and comprehensive, and as distinct as can be imagined, and it is given in the place of any enumeration of powers or duties in respect to the Susquehannah company specially. Whatever, therefore, and all which is contained in the act incorporating the Delaware Bridge Company, which is not inconsistent with or inapplicable to the Susquehannah company is as much a part of the charter of the latter as if it had been expressly enacted in reference to it. One or two considerations growing out of the act of 1808, will make this still plainer if it were necessary. The act of 1808 while it continued the Susquehannah company in existence as a corporation, not only limited its powers and purposes to bridging the Susquehannah river only, but removed the limitation of its existence to 30 years, and gave it perpetual succession. This is an express provision of the act. But the limitation is found not in the 38th section of the act of 1805, which expressly relates to the Susquehannah company, but in that portion of the act relating to the Delaware company, and is made a part of the charter of the Susquehannah company solely by the language which I have quoted which inserts into the charter of the one, this provision contained in that of the other. So also the Delaware company were bound to erect their bridges within a certain time. This also was considered by the legislature to have become a part of the organic law of the Susquehannah company, since the act of 1808 expressly

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released the latter from this obligation also, and extended the time within which their bridge was to be constructed. It should be observed also with reference to this letter provision that in the original charter of the Delaware company it is coupled with or immediately followed by a provision that upon the completion of their bridge in the manner and within the time specified it should be inspected by the judges of the court of common pleas of Delaware county, and upon their certifying to the company's compliance with the act, and not otherwise nor before, toll might be taken. So far as this conferred powers or duties upon the judge of Delaware county it was not applicable to the Susquehannah or Chenango bridges, which were in other counties, and yet the requirements of the act as to the time and mode of erection of the structures have been conceded on all hands to apply as well to the latter as to their prototypes.

The main question in this part of the case, and that upon which the supreme court decided the controversy against the plaintiffs, is the question whether the first clause of the 31st section of the act of 1805 being a part of that act relating to the Delaware Bridge Company is made applicable to and a part of the charter of the Susquehannah company by the words of the 38th section already quoted. The 31st section enacts "that it shall not be lawful for any person or persons to erect any bridge or establish any ferry across the said west and east branches of the Delaware river within two miles either above or below the bridges to be erected and maintained in pursuance of this act, except between the times the said bridges or either of them shall not be passable, or forcibly to pass the said bridges or either of them without having previously paid to the toll gatherers for the use of said corporation, the toll hereby established for crossing said bridges. The section proceeds to give a penalty and an action to recover it for passing the bridges

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without paying toll, and it adds a proviso that any person may cross the river within the forbidden limits to or from his own land, in his own craft, without toll. The effect of this provision as to the Delaware company is to confer upon them the privilege of excluding all other persons or corporations from bridging or ferrying for hire across the rivers which they proposed to bridge for a distance of two miles on each side of their bridges. It is as if the legislature had said to the Delaware company, we authorize you to build two bridges over certain rivers, and we give you the privilege of excluding all other bridges or ferries for two miles on each side of each of your bridges. Whether this was merely a privilege to last until the legislature removed the bar or exclusion, or operated as a grant and a contract against subsequent invasion of their privileges even by legislation will be hereafter considered. Assuming at present for this argument that it was the latter, and it was manifestly no unimportant part of the privileges, immunities and advantages of the Delaware company. The power to exclude competition within certain limits was hardly less valuable to them than the power to compel the payment of tolls by the exaction and enforcement of a penalty. It will not be denied that the 38th section of the act makes the latter clause or provision applicable to the Susquehannah company, or that they could by virtue of it prosecute and recover a penalty for crossing their bridge or bridges without paying the toll. After careful consideration I am unable to see why the right to exclude all other bridges for a certain distance is not in like manner conferred upon the Susquehannah company. It is true that the words of a grant of privilege to a corporation in derogation of the rights or interests of the public must be strictly construed, and nothing passes but what is explicitly granted. (*See 1 Black, U. S. R. 446*). But this is a rule which has but a remote application here, or certainly is not decisive of the present dispute. We are to

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determine this question by our apprehension of the intention of the legislature and the meaning of their words used in the act of 1802. If their language by a natural and obvious construction imports the grant of this exclusive privilege, it is but a slight argument against such a construction of it, that it appears after the lapse of fifty years that such a grant is now opposed to public convenience. No such public convenience was affected by the grant when it was made, nor can we presume that the legislature foresaw or supposed that it ever would be. The growth and development of this beautiful and flourishing region of the state, which is now a part of our history as well as matter of observation, was then hardly imagined by any one. The necessity which the legislature saw and the object which they evidently sought to accomplish was to secure the construction of one bridge and not to provide against an interference with a demand by the public convenience for more. It can hardly be supposed that the possibility of such a demand was within their contemplation at all. The argument, however, must proceed here upon the intention of the legislature at the time, and the actual consequences of their action at a remote period while they may prove that the legislation in question was unwise, can hardly show what that legislation really was or was intended to be. It is undisputed that the clause in question is a part of the privileges of the Delaware Bridge Company. It is expressly declared by the legislature that the same privileges which they obtain shall belong to their associate company, so far as they are applicable. The question then is whether this privilege of the Delaware Bridge Company is consistent with the nature and circumstances of the Susquehannah company, and applicable to the bridges of the latter. It was argued that it was not applicable to the present plaintiffs, the Chenango company, because the Chenango river is a single stream, while the act is applicable and refers to the two branches of the

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Delaware. But the question really is whether the privilege was conferred upon the Susquehannah company the parent of the plaintiffs, and the circumstances of this company nearly resemble those of the Delaware. Like the latter company, the Susquehannah Bridge Company was incorporated to bridge two streams. The Delaware company was to bridge the east fork and the west fork of the Delaware, two distinct structures widely distant, and the other company was in like manner to bridge the Susquehannah and the Chenango. If there would be any force in the argument applied to a direct succession of the Chenango Bridge Company to the privileges of the Delaware company, because the act conferring these privileges upon the latter refers to two streams and their bridge, while there is but one over the Chenango, the argument loses all its force, by reason of the fact that the title of the latter corporation is derived through the Susquehannah company, which resembled the Delaware company, exactly in the point under consideration. Nor do I find any difficulty in the fact that the Chenango river terminates its separate existence by a junction with the Susquehannah less than two miles below the plaintiffs' bridge. Whether the restriction against other bridges for two miles across the river bridged by the plaintiffs, will extend to and include the greater stream into which it is merged within that distance, or whether it only extends to the mouth of the Chenango, is a question which we need not answer at present. If the restriction in question is applicable to the plaintiffs and to the river which their bridge crosses, it will extend up and down that stream two miles so far as its existence will be recognized, and it is not inconsistent with the existence or applicability of such a privilege for the specified distance in one direction, that the river does not run or is not recognized for a similar distance from the plaintiffs' bridge in the other. It is not material to the present question if the plaintiffs' bridge is so near the

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mouth of the river that there cannot be two miles of the course of the river below included within the grant. The defendants' bridge is above the plaintiffs' and I see no reason why the plaintiffs should not have the benefit of an exclusive privilege by virtue of such a clause as this for two miles above their structure, although the situation of the latter was such that a similar privilege could only include a short distance, or even nothing at all below. I am unable to concur in the opinion expressed in the supreme court upon this part of the case. As I read these acts the effect of them is that the legislature say that it shall not be lawful for any person or persons to erect any bridge or establish any ferry across the Chenango river within two miles above or below the plaintiffs' bridge. This is the language of the act, and having arrived at the conclusion that it is applicable to the plaintiffs, the next question is upon its effect.

The legislature reserved no power to alter, amend or repeal these acts or any portion of the privileges conferred upon the companies. The plaintiffs contend that this clause of the statute of 1805 is a contract by the state that they will grant no liberty or authority to any person to bridge or ferry across their waters within the specified limits, and that the subsequent incorporation of the defendants to bridge the Chenango river less than two miles above the plaintiffs' bridge is a violation of the contract, and is therefore void under the provision of the constitution of the United States forbidding the states to pass laws which impair the obligations of contracts.

That the legislature of a state may bind the state by a contract, and that such contract is within the protection of the constitution of the United States, so that the act containing it cannot be repealed, nor the rights conferred or obligations assumed by it, impaired by subsequent legislation, are doctrines long established both in the federal and state jurisprudence. (*Providence Bk. agt. Bil-*

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lings, 4 Peters, 561; Charles River Bridge agt. Warren Bridge, 11 Pet. 420; Richmond Railroad agt. Louisa Railroad, 13 How. 71; Boston & Lowell Railroad agt. Salem & Lowell Railroad, 2 Gray, 1.

A state may even limit or measurably part with its taxing power, one of the highest attributes of sovereignty, and that by a clause in the charter of a corporation, and such a charter is a contract from which future legislatures cannot depart, nor tax the corporation otherwise than according to its provisions. (*State Bk. of Ohio agt. Knoop, 16 How. 369; Ohio Life & Trust Company agt. Debolt, id. 416; Jefferson Br. Bk. agt. Skelly, 1 Black, U. S. R. 436*). If in the present instance the plaintiffs' charter contained a clause to the effect that the state will not authorize nor allow any bridge or ferry within two miles of the plaintiffs' bridge, then the plaintiffs present a contract made with them by the state, and which the state could not violate nor impair by chartering the defendants. The case thus comes to a question of the meaning and effect of this clause of the statute. Upon this subject we are not furnished with any case precisely parallel. In the *Mohawk Bridge Company agt. The Utica & Schenectady Railroad Company* (6 Paige, 554), Chan. WALWORTH expressed the opinion that a prohibition against the establishment of a ferry within a certain distance of the plaintiffs' toll bridge, did not deprive future legislatures of the right to authorize the erection of another bridge within the prescribed limits whenever the public good shall appear to require it. The circumstances of that case, however, are different from the present, since the defendants there did not propose to carry passengers who merely desired to cross the river, and would otherwise employ the plaintiffs' bridge, but only travellers in their railroad cars from one part of the state to another. The railroad bridge, as the chancellor observes, was not a toll bridge within the meaning of the grant to the Mohawk Bridge Company. In the case of

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Thompson agt. *The New York & Harlem Railroad*, (3 Sand, Ch. R. 625), Vice-Chancellor SANDFORD construed a clause perhaps still more closely resembling that in question here, as not restricting the power of the legislature to permit the construction of other bridges, but only the right of individuals without such permission or authority. But in this case also, the bridge whose erection was complained of was a railroad bridge for the transportation of passengers in railroad cars, and not for the ordinary purposes of a bridge, or of a character to compete with the plaintiffs. The doctrine of the *Charles River Bridge case* (11 Pet. 420) is that no contract that other bridges or ferries across the same waters shall not be erected or authorized, is to be implied from the mere grant to a corporation of the right to erect and maintain a bridge and take tolls for using it. In the opinion in that case, the statement of Lord TENTERDEN in the case of *The Stonebridge Canal* agt. *Wheely* (2 B. & A. 793), is quoted with approval, that such an act of incorporation is a contract between the public and a company of adventurers, and that any ambiguity must operate in favor of the public, and the grant be construed strictly against the company.

In the recent case of *The State Bk. of Ohio* agt. *Knoop* (16 How. 388), however, the authorities are adverted to. Judge McLEAN, and his reasoning and the judgment of the supreme court of the United States in that case shows that the extent of the rule to be derived from these decisions is, that a right set up under such a grant must clearly appear and is not to be presumed. The rule is undoubtedly to be found in these and other cases that in a grant of privileges or franchises by a state, as in a royal grant, nothing passes by mere implication. Yet the construction of the express words of such a grant must be reasonable and sensible, and its objects are not to be defeated by a narrow and literal interpretation of words fairly susceptible of an enlarged sense.

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The 31st section of the act of 1805 confers upon the corporation or corporations to which it applies, two distinct privileges, one that it should not be lawful for any person to have any other bridge or ferry within a certain distance of those authorized by the act, and the other that it should not be lawful for any person to pass the bridges of the corporation without paying toll. These privileges are given in the same terms and in immediate succession. The act declares in precisely the same phrase, that it shall not be lawful for any persons to erect any bridge within the prescribed limits, or to cross the bridge to be built by the company without paying toll. Both these grants must receive a similar construction.

If the interpretation applied by the defendants to that part of the section forbidding the establishment of another bridge or ferry be correct, the residue which confers upon the plaintiff the right and the power to exact tolls for the use of their bridge must be construed in a similar manner. If the legislature are not forbidden by the clause now in question from authorizing the construction of another bridge within the limit of two miles, they are equally at liberty to authorize any person to pass the plaintiffs' bridge without the payment of tolls. This would leave the most vital and valuable part of the plaintiffs' franchise, notwithstanding the irrepealability of the statute conferring it, wholly at the mercy of subsequent legislatures. It is a consequence which would hardly be contended for by any lawyer, and yet it is difficult to see how it could be escaped, if the principles of construction for which the defendants contend are to be adopted.

The bridges or ferries which this section is designed to prohibit within two miles of the plaintiffs' bridge are evidently such bridges and ferries as are highways or open to the use of the public, either free of charge or under the payment of tolls. Private bridges, or other means of crossing the stream for the convenience of individuals ad-

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joining it, are not within the mischief against which the act aims to protect the corporation, and the section contains a proviso expressly excepting them.

But a bridge or a ferry for general and public use, whether as a common highway or upon payment of tolls, could not be erected or maintained by individuals without authority of law. The first would require at least the action of the public authorities under the existing laws to open or to accept it, and the latter could not be established at all without the intervention of the legislature to create and confer the franchise of taking tolls and maintaining the bridge or the ferry. If the section of the statute which we are considering forbids nothing but the establishment of a ferry or a bridge without authority of law by private individuals, it was unnecessary, since the existing laws were adequate to protect the company against any such acts and against any invasion of their privileges not directly authorized by legislative authority. Besides, if the erection of a bridge by authority subsequently expressly given by the legislature is not forbidden by such a clause, why should the subsequent erection of a bridge by individuals, under the authority of general laws already existing, be held within its scope? If the clause does not extend to the action of the legislature, it seems to me to forbid nothing but unlawful acts; and this, as I have observed, was unnecessary, if not nugatory.

It is true that when the legislature in an ordinary statute declares that a particular act is not or shall not be lawful, it simply declares a fact, and a fact which it is at any time competent to alter, by establishing a different rule of law in the particulars referred to. But this statute is more than a mere law, it is a contract with the plaintiffs, and the provision that the erection of another bridge shall not be lawful, is one of its terms. It would be a narrow and unreasonable construction of a contract by a private individual that a certain thing should not be done,

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to hold that its meaning was that it should not be done until *he chose to permit it.*

The thing stipulated against by this statute is something which the legislature alone can do or authorize to be done, and it is as narrow and but little more reasonable a construction of their language, declaring that it shall be unlawful, to regard it as meaning that it shall not be lawful until they chose to authorize it. The question is not one of implication, but of construction, and while nothing is to be implied, yet such a statute is to be construed fairly and with reference to its purpose and effect. It seems clear to me that where the legislature agree that an act shall not be lawful or be done, they agree that they *will not do it*, or make it lawful or permissible for others to do it. I read this statute, therefore, as forbidding the legislature from conferring the privilege of maintaining a bridge or a ferry within two miles of the bridge or bridges to which this provision applies. I differ with them in considering that the plaintiffs are entitled to the benefit of the provision in question, and that it forms a part of their charter and is applicable to their bridge.

The argument from *inconvenience cannot be listened to* by a court. If the legislature have conferred such privileges as these upon the plaintiffs, it is no answer to them to say that it was unwise, inconsistent with sound policy, or indicative of a want of foresight to do so. These are considerations for the legislature, and not for us. But there is an answer to this argument. If the possession of this exclusive franchise, or of the monopoly of the travel across this river is prejudicial to the public interests—if those interests demand the opening of other avenues, or the removal of all tolls or restrictions to the passage to and from the two portions of the village of Binghamton, which are separated by the Chenango, the remedy is an easy and obvious one. The state possesses the power, by

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an exercise of its eminent domain, to confiscate to public use both the bridge and the franchise of the plaintiffs. (*West River Bridge Company*, 6 *How. U. S. R.* 507; 13 *How. 83.*) If the public necessities require, these can both be taken away, and the bridge opened to public use, *upon due compensation* to their owners. This of course would not accomplish the objects of the defendants, since in destroying the profits of the plaintiffs, by opening their bridge to public use without toll, it would of course equally destroy the value of the defendants' bridge as a source of income. But so far as the public are concerned, and it is their interests alone which, in this aspect of the case, we are to regard, their necessities would be provided for. When the first bridge should become free and open to public use, of course all restriction upon the erection or maintenance of others would be removed, with the removal of their object and of any interest in any person to supplant them. The monopoly may thus be terminated and the means of transit multiplied to any extent, while the rights guaranteed by the legislature to the plaintiffs would be protected, and compensation awarded them for those rights when the public good demanded their extinction.

I am of opinion that the judgment of the supreme court in this case should be reversed and judgment given for the plaintiffs.

SUPREME COURT.

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A sale by a referee, executing a judgment of the court in an action of foreclosure, is within that section of the statute of frauds which provides that no estate or interest in lands shall be granted unless by act or operation of law, or by deed of conveyance in writing subscribed by the party making the same.

But the transaction between the referee and the successful bidder, on such sale, is not to be regarded as a *contract*, and is not within that section of the statute, requiring contracts of sale to be subscribed by the seller of the land.

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In such a case the referee acts as the minister of the court, and although no action could be maintained against the purchaser on the memorandum subscribed by him at the foot of the conditions of sale—a *quasi* contract, lacking essential elements of a contract, parties, mutuality, consideration; yet that was really a submission to the jurisdiction of the court in the foreclosure suit—a consent to the exercise of the powers which courts of equity assert *ex proprio vigore* over purchasers.

A purchaser having deposited the 10 per cent. with the referee and failed to complete, and a second sale having been made for a much less sum, the percentage so paid into court will be applied towards the payment of such deficiency.

Where one claiming under such defaulting purchaser as the owner of the bid, becomes the owner of the judgment and obtains an order in the cause giving him the right to complete the purchase, but fails to do so to the prejudice of a subsequent inquirer, the court, at special term has no power to postpone the payment of the judgment out of the proceeds, and to apply the moneys, in the first instance, to the satisfaction of subsequent liens.

JUDGMENT of foreclosure and sale, in the usual form, having been entered, the premises were sold by Samuel Johnson, referee, on the 17th of March, 1853, at public auction, to John Thursby and others, for \$30,050, and the 10 per cent. was deposited, by Thursby, to whom the other purchasers assigned their interest in the bid. At the sale the usual printed terms of sale were used, and the purchasers signed at the foot thereof the usual promise to complete. The referee did not subscribe any contract of sale, or make any report or deed. On the 23d of April, 1853. John Thursby died, and his widow, John B. Thursby, and three other sons, acted as executrix and executors. On the 4th of May, 1853, the plaintiff assigned the said judgment to John B. Thursby.

Upon the petition of John B. Thursby and his said three brothers, a reference was had, and the referee reported that they were the owners of the bid, and thereon an order was made in the cause on the 31st of December, 1858, affirming that report and directing the referee to convey the premises to John B. Thursby and brothers on the settlement and payment by them of the balance of the purchase money, and that upon the consent of Mrs. Van Alst, who held the second mortgage, and of Mr. Britton, the owner of the equity of redemption, they should receive

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mortgages for their respective shares of the surplus; Hezekiah D. Hull, the third mortgagee, to be paid in money. This order was not carried out, except that some payments were made to Mrs. Van Alst on account of interest due on her mortgage.

On the 29th of July, 1859, John B. Thursby and his said three brothers made an assignment of their property, including the judgment in this action, to Charles H. Trask, Esq.

On the 6th of March, 1860, upon petition of Britton, an order was made at special term, directing a resale of the premises by the referee (unless Mr. Trask should elect to carry out the order of December, 1858), and reserving all questions as to the application of the proceeds. Under this order, the premises, on the 12th day of June, 1861, were sold to Hezekiah D. Hull for the sum of \$10,000, and the 10 per cent. deposited.

Thereupon Hull, upon petition, reciting the whole proceeding, applied to the court at special term for an order that the moneys arising from both sales be applied to the payment first of the mortgage of Mrs. Van Alst, and secondly of his own, instead of being applied first to the satisfaction of the judgment. At a previous special term Judge Brown directed that the motion stand over to the end that the executrix and executors of John Thursby, claiming to be interested in the moneys deposited on the first sale, might be made parties.

Wm. R. STAFFORD, *for the petitioner, Hull.*

MR. GRIFFIN, *for Mrs. Van Alst.*

OLIVER DYER, *for Mr. Trask, the assignee of Thursbys.*

JOS. NEILSON, *for the executrix, &c.*

The counsel for the petitioner Hull made the following points:

I. The defendant Hull is the only real party injured,

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and as all the parties personally liable are insolvent he has no redress unless relieved by the court.

His application is addressed to the equitable powers of the court to compel *equity* on the part of the contestants.

We do not ask to vacate the judgment, or that the amount directed to be paid the plaintiff on his mortgage debt be forfeited, but that its payment be postponed so that the plaintiff's assignee shall *not* be paid until Mrs. Van Alst and our mortgages are satisfied.

II. This is an equitable application, and does not involve any forfeiture of the decree.

A court of equity has always power to modify its decrees, and control and direct the application of moneys arising under its decrees.

It might with force be insisted that the payment of the plaintiff's claim by the purchasers at the first sale extinguished and satisfied it in fact. They were bound to pay it out of the purchase money, and could not keep it alive by taking an assignment, evidently colorable and intended to delay subsequent creditors and incumbrancers.

If this were a common law judgment for a sum of money, such a payment would undoubtedly extinguish the claim as against subsequent creditors.

It is precisely the position of a *dormant* execution.

By the acts of the parties owning the judgment they have rendered it *dormant* so far as we are concerned; neglecting to act for more than eight years, they cannot complain if they are now forced to what they should have done at that time: *i. e.*, pay in the money sufficient to satisfy our demand.

The holder of the judgment, being the purchaser and holder of the bid at the sale, was bound for the whole amount of the bid, \$30,500; as he cannot (being insolvent) complete or pay his bid, the amount of the judgment due him is the only property (except the 10 per

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cant.) which can here be attached to secure the other creditors who are injured by his acts.

And although it is equitable that it should be wholly forfeited, our application merely postpones its payment, and thus does not work a forfeiture.

John B. Thursby, the assignee of the plaintiff's claim, was at the time or shortly afterwards the owner (whether alone or with others is immaterial) in *equity* of the premises, and was entitled to and would have received a conveyance if compliance had been had with the terms of the first sale; and it is well settled that "where the equitable owner for his own benefit pays off a mortgage he cannot, by taking an assignment, hold it as an outstanding lien. *He is not a stranger*, and has no equities superior to the subsequent incumbrancers." (*Peltz agt. Clark*, 5 *Peters*, 481.)

A prior lien is not entitled to prior payment if the party holding it has by his acts displaced it. (12 *Wheaton*, 507).

The payment to plaintiff was in fact a payment on the bid and merged the title. (*James agt. Morey*, 2 *Cowen*, 246; *Lansing agt. Goelet*, 9 *Cowen*, 346-403; *Spencer agt. Ex's of Hartford*, 4 *Wendell*, 381.)

The doctrine that a holder of a prior mortgage will be postponed in payment, if by his acts subsequent parties are injured, is fully sustained in *Lee agt. Munroe*, 7 *Cranch*, 366; 1 *Story Eq. Juris.* § 564.)

Thursby's non-compliance with his contract of purchase has caused us to lose our debt.

III. In the next place we ask that the 10 per cent. paid into court upon the first sale should be appropriated as far as it will go to the payment of Mrs. Van Alst's claim.

1. It is, we submit, wholly immaterial whether any contract of sale was made between the Thursbys and the referee.

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The money is in court, to be disposed of by order of the court.

It was not paid in under any mistake.

It could *never* be recovered by those who paid it, even if they held no evidence of title.

If *they* repudiate the sale, they forfeit the money.

No one has ever refused to give them the deed.

They are estopped from taking advantage of their own default.

If one purchase real estate by a verbal contract, and make a payment on account, can he recover it back, the other party not only not being in default, but offering to perform?

2. The sale was perfect and valid in fact.

A memorandum was signed by the party to be bound as required by statute. (2 R. S. 316, § 8; 16 *Wendell*, 28; 16 *Wendell*, 460; 21 *Wendell*, 467; 2 *Caines' C. E.* 87.)

The terms of sale were clear, distinct and positive, and were signed by the referee, and the agreement to purchase on those terms was signed by the purchaser.

They are in the usual form; although even if defective in form, a court of equity would reform and direct performance accordingly, and "courts of equity will regard the substance and not the mere form of agreements relating to lands, and will give them the precise effect which the parties intended in furtherance of that intention." (2 *Story Eq. Juris.* § 791.)

3. All the authorities cited on the other side apply to actions where specific performance is sought, and not to judicial sales. The referee acts as the officer of the court, and if he violates his duty the court will compel it. It is wholly unnecessary that he should sign a memorandum to do his duty.

The question here is not whether the Thursbys made a *perfect* contract of sale, but whether they made the bid and

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deposited the money which we ask to have applied in payment of the debt.

4. The purchasers not only paid the 10 per cent., but also the plaintiff's claim; entered into and remained in possession for over eight years, holding the only equitable title. (2 *Caines' Cases*, 87.)

They are estopped from questioning the validity of the sale.

5. The orders of court, made December 31st, 1858, and March 6th, 1860, fixed the rights of the parties, and cannot now be questioned.

They in themselves establish and *judicially* determine the validity of the first sale.

IV. The order of December 31st, 1858, was obtained upon the application of the parties who now resist our motion.

It is in full force, and the time to appeal from it has long expired.

That order *must have* been obtained on notice to *all parties* (including Thursby's executors,) because *four of them* made the application.

It is not pretended that notice was *not* given.

It was determined by that order and by the referee's report, on which it was based, that Trask's assignors (the younger Thursbys) then owned the bid, and were entitled to the conveyance or performance of the terms of sale.

V. The estate of the elder Thursby has no interest in the 10 per cent.

As matter of fact that is determined by the order of December 31st, 1858; and it is now too late for them to question it.

The execution and delivery of the bond and mortgage to Mrs. Van Alst affords very strong evidence that Thursby's estate had no longer any interest in the purchase.

The bid, moreover, did not belong to the elder Thursby exclusively, and whatever interest he had in it, as he was

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not the sole purchaser, went on his death to his surviving copurchasers, and not to his executors or heirs at law.

At most all that could so descend would be the one-third of the bid.

VI. Equity in all cases treats the vendor of real estate, where a contract of sale is executed, as the trustee for the vendee of the estate; and the vendee as the trustee of the vendor of the purchase money. (2 *Story Eq. Juris.* § 1,212, § 790.)

Clearly, therefore, John B. Thursby, on being vested with the title to the mortgage by paying the plaintiff and by taking assignments of the bid at the sale became the equitable owner of the land and *trustee* of all parties interested in the purchase money.

His assignee Trask is not a *bona fide* purchaser for value and has no greater rights.

His payments to Mrs. Van Alst are shown by Griffin's affidavit, the bond to Mrs. Van Alst and the other papers, to have been made by him as *assignee* solely.

Our application, therefore, comes within the principle of equity governing such cases, to compel the *trustee*, who held undisturbed possession for eight years, to perform a part of his duty as *trustee*, for *our benefit*, of the purchase money; and as he is insolvent, we are not asking too much in demanding that his interest in the judgment and the money paid on the land should be appropriated to our use; as even then we are remediless for the remaining deficiency.

The counsel for Mr. Trask and for the executrix claimed:

I. That the sale to John Thursby and others was not perfected, or binding, and should go for nothing.

By the decree the referee was authorized to sell and convey. He offered the property and received a bid, with a written promise signed by John Thursby and others, to carry out the purchase. Our position is that this sale

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should have been made in writing, such sale being within the statute of frauds.

The statute provides (3 R. S. 220, § 6) that *no estate or interest in lands shall be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance subscribed by the party assigning, &c.,* and (§ 8) that *every contract for the sale of lands or an interest in lands, shall be void, unless the contract, or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party by whom the sale is to be made.*

The case comes within one or other of these provisions. If what transpired at the auction when the premises were bid for and struck down, rested in contract, as we shall endeavor to show, then we come within the 8th section. If, however, that was not mere matter of agreement, contract, or bargain, but an actual sale, creating or declaring an interest in the land, then we come within the 6th section.

The sale by the referee was a sale of lands, or of an interest in lands. If John Thursby and associates purchased anything it was an estate or an interest in lands. They acquired an interest in or a power over or concerning lands; or, we must assume, that the referee, by the act performed, created, granted or declared an estate or interest in lands. If not, what did they purchase or acquire? What passed to them? What did the seller part with, surrender, or declare? Of course, it was an interest in lands burdened with the condition of payment: a present interest defeasible and inchoate, yet an interest in lands.

To this end a writing or conveyance was necessary, and it must have been subscribed by the referee. But the referee made no conveyance, and did not subscribe any grant as required by the 6th section. It will not do, therefore, to call this a sale by the referee so complete as to get rid

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of the necessity or existence of a contract for such sale, since, in such view, the 6th section applies.

The words "by act or operation of law" in the 6th section as shown by KENT, Ch. J., in 2 *Caines' R.* 64, have no application to such a sale.

Turning then to the 8th section, it appears:

1st. That the contract must be in writing.

2d. That the consideration must be expressed.

3d. That the paper must be signed by the seller.

The referee was the *seller*, and we admit that if he had signed any memorandum substantially setting forth the transaction, the bidder would have been bound. But nothing of the kind was done.

This statute governs all contracts for the sale of lands or of an interest in lands; all sales by which an interest or estate in lands is to be created or declared.

The most apt words are used, reaching every case: the conveyance is to be in writing, subscribed by the *party* conveying, creating, or declaring the estate or interest; or the contract is to be in writing and subscribed by the *seller*; the words *party* and *seller* comprehending sheriff, referee, owner, as the case may be.

The act could not have been more comprehensive. *Every contract*, not every contract save at official sales, or under decrees or judgments, or by sheriffs, masters or referees, but *every contract*. There is no exception or limitation whatever.

Thus, taking these two sections together, you find that no estate or interest in lands can be acquired, that no contract of sale can be made for such estate or interest, save by writing duly subscribed.

Is it a sale *in presenti*, granting, creating or declaring an estate or interest in lands? the 6th section applies.

Is it a contract for such sale or interest, then the 8th section applies. So, whether the referee *sold*, or *contracted to sell*, the case is equally within the statute.

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But we submit, with confidence, that the 8th section reaches and governs the case.

The referee was to sell, and to this end it was necessary that he enter into a contract with some purchaser. They were to agree upon the price, hence there must have been an agreement. It was not possible to sell without contracting. The sale was a contract, or it was nothing; a contract of sale; the deed, a deed of bargain and sale.

In foreclosure sales, or in cases where from the nature of the thing there must be delay in payment or in conveying, to the end that a title may be examined, the whole matter necessarily rests in mere contract. Until payment and conveyance the purchaser has not the title or the right of possession, but he has a claim according to the terms of his purchase, as evidenced by the agreement. What, then, would be his condition if there were no contract?

That this statute applies is evident from the facts:

1st. That it is thus comprehensive, including every estate or interest in lands to be created or declared; every contract for the sale of an interest in lands, under all conceivable circumstances.

2d. That the referee was to do the very thing—sell or contract to sell—mentioned in this statute, neither more nor less.

3d. That the act as to sales by foreclosure of mortgages has no provision and gives no direction on the subject, thus leaving the whole matter to the general statute.

4th. That there is no other statutory provision on the subject of selling or contracting for the sale of lands at all in conflict with or modifying this statute.

In *Ely* agt. *Ormsby* (12 *Bar. S. C. R.* 571), Mr. Justice *PRATT*, speaking of a sale of personal property, and referring to 5 *Hill*, 200, and 1 *Const.* 261, says, “*words alone will not suffice*,” and we but appropriate this as applicable to sales of real estate. The referee was to sell; and for this

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mere words would not suffice. Yet, on his part, we have mere words. He never put pen to paper on the subject of this sale. The counsel reminds us that John Thursby and his associates signed a promise to complete the purchase, and that there were the usual terms of sale. Let us examine this matter, and see how far all that is material; or, rather, permit us to submit the distinct proposition that such signing and terms of sale are to be put aside, as having nothing whatever to do with the question before the court.

1st. *As to the written promise.*

The sale being within the statute, it is not material what the purchasers signed, or whether they signed anything; *it is the seller who is to subscribe.* The practice of signing such a promise obtained before the change in our statute; then the contract was to be signed by *the party to be bound thereby.* Then such paper so signed was material. We need not say that it was necessary, because, as no action need have been brought on such paper or contract, the thing which that statute prohibited, the court could order the sale to be completed. But after the change of our statute, such signed promise lost its office and significance utterly. Thenceforth it had no more bearing upon the question, under the statute, than a piece of blank paper. It is now an idle form. The statute which declares the contract *void* unless it be subscribed by the *seller*, cannot be satisfied by having the purchaser sign even the most formal documents. The question would equally remain whether a sale had been made; whether the seller had subscribed the contract? So, for all purposes, this paper is to be disregarded.

2d. *As to the printed terms of sale.*

Such papers have been found convenient in sales by sheriffs, masters and auctioneers, and belong as much to one as to the other. A sale of mortgaged premises without such a paper would be as valid as with it. It has

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nothing to do with the statute—is an utter stranger to the statute. It does not add to the validity of the sale, except in cases where it is annexed to or incorporated in the contract subscribed by the seller of the land.

In *First Baptist Ch.* agt. *Bigelow* (26 *Wend.* 28), the sale of a pew by an auctioneer was held void for want of the proper written memorandum or contract under the statute, and this though at the time of the auction a written or printed advertisement of the sale, containing the conditions, was read to the purchaser.

In *Hyde* agt. *Whitehouse* (7 *East R.* 558), the auctioneer had a printed catalogue and a paper containing the conditions of the sale. He wrote on the catalogue, opposite to the article bid for, the price and name of the purchaser. The conditions were not annexed, and the contract was held incomplete.

In *Tallman* agt. *Franklin* (4 *Kernan*, 584), the terms of sale were actually attached to the memorandum of sale, signed by the auctioneer, and so made part of the contract.

In *Bragden* agt. *Bradbear* (12 *Vesey*, 472), the master of the rolls, in considering the question whether auction sales were within the statute, says, that although ordinarily the terms and conditions are reduced to a certainty by a written or printed particular, yet if it be true that the statute does not affect any sales at auction, the whole of the terms might be left to parol evidence at the hazard of all the uncertainty which the statute intended to exclude.

So far as this question has received judicial notice, it may be safely said that no adjudication has been made adverse to our position in respect to sales by either sheriffs or referees. It was formerly supposed that a different rule applied to sales by masters.

In *Atty. Gen.* agt. *Day* (1 *Ves.* 218), Lord **HARDWICKE** stated that *judicial sales* were not within the statute, and

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the case has been referred to by writers as illustrative of the English chancery practice.

The bill in that case was for settlement of John Eldridge's estate under a will. He had devised land; then by a codicil bequeathed a sum of money instead to a charity. The court directed the master to devise a scheme for carrying out the bequest. He reported a scheme for laying out this money in land. On the hearing it was questioned whether the arrangement, agreement, or scheme —whatever it was—was binding under the statute.

Lord HARDWICKE mentions several cases where he thought the statute did not apply, including some since ruled otherwise; and says that masters' sales, *judicial* sales, are not within the statute; that the judgment of the court takes it out of the statute.

Sugden (1 *Vend & P.* 92) refers to this case and says: "a sale by a master is not within the statute of frauds, and after confirmation of the master's report of the best purchaser, the sale will be carried into effect;" that "the judgment of the court taking it out of the statute."

In *Parsons on Contracts* (2 Vol. p. 292, note 2) it is said that the doctrine formerly prevailed that sales of land by sheriffs and by masters in chancery under decrees of the court were not within the statute. "But this has since been overruled, and sales of this description are now put upon the same footing with other auction sales."

Auction sales are clearly within the statute. (10 *Paige R.* 526; 8 *Bar. S. C. R.* 130; 1 *Duer R.* 89; 4 *Kernan*, 584; 12 *Vesey*, 472.)

In *The National Fire Ins. Co. agt. Loomis* (11 *Paige R.* 433) the chancellor said that the question whether masters' sales were within the statute did not arise, but that if such sales are within the statute (as to which he does not intimate a doubt) the master's report would be a compliance. Beyond this casual reference to the subject we

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do not find that the late chancellor had occasion to notice it.

Thus then we submit that as the referee did not subscribe the contract of sale, no valid sale or contract was made.

II. The legal representatives of John Thursby, the estate being represented in the matter and before the court for the first time, may be heard without prejudice.

The four sons, named in the order of December, 1858, were executors, but that order relates to their personal character, not to them as executors; and Mrs. Thursby, the executrix, was ignorant of the proceeding.

The representatives, as such, have never recognized the sale as valid or waived a return of the moneys thus deposited, and nothing can be taken by implication against them.

III. The deposit so made by John Thursby should be paid over to the executrix, &c.

It belongs to the estate. It was doubtless deposited in good faith, and with intent to complete the purchase. It was deposited by John Thursby on the assumption that he was bound; that a valid contract had been made, duly subscribed by the referee. This was a mistake of fact.

The reason why the part performance known to a court of equity as aiding a parol contract of purchase does not arise by payment of the consideration money merely, is that the money can be restored. We are here to ask such restoration. (3 *Sand. Ch. R.* 279; 4 *Cow. R.* 403; 3 *Johns. Ch. R.* 283; 2 *Hill's R.* 486.)

IV. As to the order of December, 1858.

It gave the four Thursbys the privilege of carrying out the sale in a certain manner. It was simply permissive, neither creating nor imposing any obligations on them.

If it had been intended to bind the Thursbys to pay or to carry out the purchase, affirmative words would have

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been used to that effect. None are used. (*Acker agt. Ledyard, 8 Bar. R. 515.*)

V. The amount of the decree with interest should be paid to the representatives of the plaintiff.

The petitioner, considering that John B. Thursby, to whom the decree had been assigned, was a party to the order of December, 1858, and that the leave given by that order was not availed of, thinks that a penalty should be inflicted to the extent of the decree. To this claim there are several answers.

1st. Not so, because of the permissive nature and terms of the order itself.

2d. Not so, because on that very order it is provided that the amount of the decree should be paid to John B. Thursby.

3d. Not so, because this court has not the power to so direct. (a.) By the decree it is provided that certain sums shall be paid to the plaintiff out of the proceeds. This provision is binding and conclusive. Mr. Hull, the petitioner, was a party to that decree. His attempt now to amend the decree or to make a new one in that respect is untimely and untenable. (b.) By the statute it is expressly provided that the proceeds to the amount of the decree shall be applied to satisfy the plaintiff. (2 Rev. S. 272, § 89.) This statute is to be obeyed. (c.) The only power given to the court in respect to which parties can be heard and orders granted applying the moneys, *is as to the surplus.* (d.) The claim thus interposed is inequitable.

When Mr. Hull took his mortgage, this plaintiff's and Mrs. Van Alst's mortgages were prior liens. It is to be supposed that he knew the property and its value, and thus by his own act and with full knowledge he acquired the relation he now bears—that of the *third incumbrancer.*

He does not, therefore, come within any rule of equity ever applied in disturbing the relation or priority of liens. Those are cases where such relief has been granted, as

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where a person takes a mortgage for value, without notice of an existing unrecorded mortgage, or where those having liens were present and induced or permitted such person to take a mortgage under the mistaken belief that the property was unincumbered, and the like. But there is no case where that has been done after a decree and sale on the prior mortgage, or in favor of one who knew that the mortgage he was taking was a subsequent lien.

SCRUCHAM J. One of the questions on this motion is as to the application of the money which was paid to the referee on the first sale of the mortgaged premises made pursuant to the judgment in this action.

The counsel for those who now represent the bidders claim that the sum deposited on the sale should be returned to them on the ground that the sale was void, because no contract in writing, or note, or memorandum thereof expressing the consideration was signed by the referee.

This brings up the question whether a sale by a referee under and in pursuance of a judgment of the court, rendered in an action for the foreclosure of a mortgage is within the statute of frauds.

It is doubtless within that section of the statute which provides that no estate or interest in lands other than leases for a term not exceeding one year shall be granted unless by act or operation of law, or by deed or conveyance in writing subscribed by the party granting the same or by his lawful agent, thereunto authorized by writing; and the title to the land will not vest in the purchaser at such sale until such a conveyance by the referee has been executed and delivered.

The authorities cited in support of the proposition that judicial sales are within the statute only go to this extent.

Simonds agt. Catlin, 2 *Caines*, 61, and *Jackson agt. Catlin*, 2 *Johns*. 248, were both acts of ejectment; in the first of which the plaintiff claimed as purchaser at a sheriff's sale

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under execution, and was defeated because he did not produce any deed or note in writing signed by the sheriff, and passing the estate; and, in the second, the defendant claimed as purchaser in a similar case, and produced the execution and return of a deed executed by the sheriff to him and left by the sheriff with a third person as an escrow to be delivered to the purchaser on payment of the purchase money; and it was held that the estate did not pass by the deed for want of delivery, nor by the return for want of sufficient certainty as to the lands sold and the purchaser. The counsel in referring to this case say that the sale failed because "the sheriff's return did not contain all the statutory requirements to constitute a contract, and this too although the sheriff had executed a deed and left it as an escrow;" but I do not so understand the decision.

The sufficiency of the contract of sale was not questioned in either of these cases, but only the necessity of its consummation by conveyance to pass the estate to which it referred; and the learned judge who delivered the opinion of the court in both cases distinctly indicates that section of the statute of frauds which is thereby held to be applicable to such sales by saying in the first case: "It appears to us that sheriffs' sales must be within the statute of frauds which declares that no estates of freehold or term of years shall be granted but by deed or note in writing, or by act or operation of law."

The reasons upon which this conclusion is rested are drawn from the manifest public inconvenience and great uncertainty as to titles which would result from allowing the sale itself and the return endorsed on the execution to constitute sufficient evidence of title; and they will not sustain a conclusion that the contract of sale is void because the sheriff omits to subscribe a memorandum of it, as none of these evils could result from such an omission.

The transaction between a referee, executing the

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judgment of the court by a sale in an action of foreclosure and the successful bidder, cannot strictly be regarded as a contract. The referee, acting only as the minister of the court, assumes for himself no obligation to complete the sale, and can impose none upon the court which he represents. It is always within the power and often becomes the duty of the court to set aside these sales, and this is entirely inconsistent with the idea that they are contracts of the court, for a contract is an act which contains a perfect obligation which cannot be annulled at the pleasure of the party bound by it.

Moreover, a court has no such legal entity as capacitates it to make a contract, for it is neither a person nor a corporation—can neither sue nor be sued.

It has just been held in this district that an action cannot be maintained against the purchaser at a foreclosure sale, on the memorandum subscribed by him at the foot of the conditions of sale, stating that he had purchased at a certain price, and that he agreed to comply with the conditions; and the learned justice who delivers the opinion of the court says of the agreement of the purchaser: "If it is to be called a contract at all, it is a contract with the court. The sale is made by the order of the court, and is under its control, and not that of any party to perform or to rescind. In truth, however, the word contract is somewhat artificially used when it is applied, as it has been, by judges to such papers. The memorandum signed by the defendant was only a quasi contract; it was in reality a submission to the jurisdiction of the court in the foreclosure suit as a purchaser under the judgment. It is easy to see that it lacked the most essential elements of a contract, not only parties, but mutuality and consideration. It contained, or was intended to contain, an express consent to the exercise of the powers which we have seen courts of equity assert *ex proprio vigore* over purchasers, and it is doubtful if it added anything to the jurisdiction

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or authority of the court in this particular. There can certainly be no suit maintained upon it as an express stipulation with any person whatever." (*Miller agt. Colyer, decided 1st Monday of March, 1862; MS. opinion of Emott, J.*)

The sale by the referee is a proceeding in the action, and the purchaser, by becoming such, submits himself to the jurisdiction of the court as to all matters connected with the sale or relating to him in the character of purchaser. (*Requa agt. Rea, 2 Paige, 339.*)

His rights and liabilities do not grow out of a contract, but arise from this proceeding and submission; and as the referee makes no contract, the provision of the statute of frauds, requiring contracts for the sale of lands to be in writing and subscribed by the party by whom the sale is to be made, is not applicable.

The failure of the purchasers on the first sale to complete their purchase, rendered a new sale necessary, and as the sum for which the mortgaged premises were sold at the last sale is greatly less than that at which they were struck off to them, the percentage which they paid into court on their bid must be applied, as far as it will go, to the payment of that deficiency.

The order of December 31st, 1858, and the report of the referee upon which it was founded, determined that all rights under the first bid then belonged to John B. Thursby, Robert G. Thursby, James S. C. Thursby, and Samuel J. Thursby, and it appears that John B. Thursby was then the owner of the judgment in this action and of the mortgage foreclosed by it.

All of these persons afterwards became insolvent, and made a general assignment of all their property to Charles H. Trask, including not only all the rights they possessed under the bid, but also, by the assignment of John B. Thursby, the judgment and mortgage.

The holder of the third mortgage upon the premises,

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who became the purchaser at the second sale, alleges that the purchase money will be insufficient to pay the amounts required to be paid by the judgment in this action, the mortgage held by Mrs. Van Alst, as executrix, and his mortgage; and that as the only parties liable for the deficiency arising on the resale are insolvent, he will lose the whole amount due him, unless it be paid out of the purchase money before the amount due on the mortgage to foreclose which the action was commenced; and he claims that in equity such direction should be made, as the loss will be occasioned by the failure of the owner of the judgment and mortgage to comply with the obligations he assumed as assignee of the bid.

The judgment in an action for the foreclosure of a mortgage determines the amount due to the plaintiff, and his right to its payment out of the proceeds of the sale of mortgaged premises, and if regularly obtained, I do not think that the court at special term can change it in these important particulars.

The payments of interest on the mortgage held by Mrs. Van Alst, as executrix, were voluntary, and it is difficult to understand why they were made, if not to prevent proceedings being taken to enforce her claim upon the premises.

They were made by the owners of the bid, whose failure to comply with the conditions of the sale caused so large an amount of interest to accrue, and they extinguished the lien of the mortgage to their amount. It would not be equitable to revive it in favor of the defaulting bidders or their assigns, to the prejudice of the holder of the last mortgage.

An order must be entered directing that the moneys in the hands of the referee, arising on the first sale, together with all of the proceeds of the second sale, be applied in the first place to the payment of the various sums directed by the judgment in this action to be paid and allowed out

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of the proceeds of the sale of the mortgaged premises; in the next place to the payment of the amount due on the mortgage to Elizabeth Van Alst, as executrix, &c., and in the next place to the payment of the amount due on the mortgage to Hezekiah D. Hull, and that if any surplus remain after such payments, it be brought into court. That the purchaser at the second sale, viz: the defendant, Hezekiah D. Hull, shall (if Elizabeth Van Alst, executrix, &c., shall consent to receive the mortgage hereinafter mentioned,) be relieved from the payment in cash of any greater sum than that which shall be sufficient to pay such surplus, if any, and, with the moneys now in the hands of the referee, the various sums directed to be paid and allowed by the judgment. And that on such payment, the referee be authorized to deliver to him his deed of the mortgaged premises, upon receiving his bond and mortgage to Elizabeth Van Alst, executrix, &c., for the moneys payable by the referee to her, to be a first lien upon the mortgaged premises, and his receipt for the moneys payable by the referee to him.

SUPREME COURT.

THE PEOPLE *ex rel.* T. STREETFIELD CLARKSON and others
agt. HOMER A. NELSON, county judge of Dutchess
county.

Where the *commissioners of highways of two adjoining towns, in different counties, assemble together in joint board, and unite in an order laying out or refusing to lay out, altering or discontinuing, or refusing to alter or discontinue, a road or highway, their judgment and determination cannot be reviewed by appeal to a county judge of one of the counties.*

It seems, that in the absence of any provision of the statute for review in such a case, the determination of the joint board of commissioners must be considered final, and equivalent in all respects to an order of one board of commissioners affirmed by three referees on appeal.

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Kings General Term, December, 1863.

BROWN, SCRUGHAM, and LOTT, Justices.

APPEAL from an order made at special term, denying relators' motion for a peremptory mandamus to the county judge of Dutchess county.

R. E. ANDREWS, for the relators.

J. W. ELSEFFER, for the defendant.

By the court, **BROWN, Justice.** Clermont is one of the towns composing the county of Columbia, and the town of Red Hook is a part of the county of Dutchess. On the 9th day of January, 1863, the commissioners of highways of both towns made an order, bearing date on that day, pursuant to section 76 of the act in regard to the laying out public and private roads, &c., (1 R. S. 516), refusing to lay out a public highway extending into both the towns of Clermont and Red Hook, and particularly described in such order, and which order was duly filed in the clerk's office of both towns respectively, on the 10th day of January, 1863. From this order the relators took an appeal to the county judge of the county of Dutchess, on the 19th day of February, 1863, claiming and insisting upon a right to appeal therefrom, under and by force of the 8th section of the act of the 14th December, 1847, to amend the act to reduce the number of town officers and town and county expenses, &c., passed May 10th, 1845, which appeal the county judge refused to entertain, upon the ground that no appeal could be taken from the joint order and determination of the commissioners of highways of two adjoining towns, but situate in different counties. The relators thereupon applied to the special term of this court, held before Mr. Justice EMOTT, upon motion in the usual form, for a peremptory writ of mandamus directed to the county judge, commanding him to entertain the said appeal, and proceed to the appointment of referees to hear and determine all

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appeals from the said joint order, pursuant to the provisions of the said 8th section. The court at special term denied the relators' motion, and thereupon they appealed to the general term.

Originally the right of appeal from the order or determination of the commissioners of highways in laying out, altering or discontinuing, or in refusing to lay out, alter or discontinue a road, was given by section 84 of the act for laying out public or private roads, &c., (1 R. S. 518), to any three of the judges of the court of common pleas of the county in which the road was situated. The appeal was to be taken within sixty days after the making of the order. They were to have exclusive jurisdiction of all appeals from the same order, to the end that their decision when made should embrace the whole subject. They were to suspend proceedings upon the appeal first made and upon all other appeals, until the time limited for such appeals should have expired. In this way they became possessed of the whole subject of the road, and could make a determination which would conclude all parties having an interest in the road. The decision of the judges, or any two of them, was declared to be conclusive. It was to be reduced to writing, and filed by them in the office of the town clerk of the town, who was to record the same. If the decision of the commissioners of highways was affirmed, the compensation of the judges was to be paid by the party appealing, and if the decision of the commissioners was reversed, the fees of the judges was a charge upon the county. If the appeal was from an order of the commissioners refusing to lay out or alter a road, and the judges reversed such order, the judges were directed to proceed to lay out or alter the road applied for, in doing which they were to proceed in the same manner as the commissioners of highways are directed to proceed in like cases. Such road was to be opened by the commissioners of the town in the same manner as if laid out by them.

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selves. It is quite obvious that these various provisions are not applicable to a road which extends, or which it is proposed to extend, into the towns of different counties, for appeal could not be made "to the judges of the court of common pleas of the county in which the road is situated," because it is not situated in one county, but in two or more. One set of judges could not obtain exclusive jurisdiction of all the appeals, which it was a principal object of the statute to accomplish, because a construction which would give an appeal at all, must logically give it in each of the counties in which the road is situate, and thus two different classes of judges would obtain jurisdiction of the same subject. So the filing of the decision upon appeal in one town clerk's office, which is all the statute directs, would fail to effect another purpose which the law plainly has in view, and that is, to file the decision, which is to be a record, in the town where the road is situated, and whose officers were to have charge of it. So also the provision in regard to the compensation of the judges when the decision of the commissioners was reversed, indicates in the most unequivocal terms that the road has to be wholly within the county chargeable with the expenses.

The act of the 14th December, 1847, before referred to, has wrought but little change in the proceedings upon appeal from the orders of commissioners of highways. The 8th section substitutes the county judge in place of the judges of the court of common pleas, and in place of hearing and determining the appeal himself, he shall, after the expiration of the sixty days within which an appeal may be brought, appoint three freeholders as referees to hear and determine all the appeals which may have been brought within the sixty days, and the referees must be residents of the county, but not of the town, wherein the road shall be located. These referees are to possess the powers and discharge the duties heretofore possessed and discharged by the three judges of the court of com-

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mon pleas, and give the same notices heretofore required to be given under the act for laying out private and public roads, to which I have before referred. The absence of any provision for an appeal from the joint order of the commissioners of highways of two towns situate in different counties, in regard to a road or highway extending into both, is either a *casus omissus*, or what is more like, a manifestation of the legislative will that when the commissioners of the two towns assembled together in joint board, and united in an order laying out, or refusing to lay out, alter or discontinuing, or refusing to alter or discontinue a road or highway, their judgment and determination should be final, and equivalent in all respects to an order of one board of commissioners, affirmed by three referees upon appeal.

The order of the special term appealed from should be affirmed, with \$10 costs.

NEW YORK SUPERIOR COURT.

ZACHARY PECK, assignee, &c., respondent agt. ELIZA J. BROWN, appellant.

An action given under the Revised Statutes respecting the determination of *claims to land* (2 R. S. 313, § 3) is, under the Code, subject to the *same rules* as all other actions; and the *same defences* to defeat the right to such relief may be set up by the defendant, and also equitable relief by way of *counter claim*.

Where the plaintiff brought his action as *trustee of an express trust* (for the benefit of creditors) against the defendant, and the relief demanded in his complaint, in addition to that given under the statute respecting the determination of claims to real property, was that the plaintiff's title *might be quieted* and adjudged free and clear from *any right claimed by the defendant*, and other relief.

And the defendant claimed said premises under a *full covenant deed, given and executed to her by her husband*, several years before the plaintiff's alleged title accrued, for a good and valuable consideration, and in performance of an agreement to that effect, with intent to *settle the same upon her as her separate estate, and to vest in her an absolute estate therein, in fee simple*.

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Held, on demurrer, to the answer, that the *voidness at law* of a deed directly from a husband to his wife, does not interfere with *equitable rights* which may grow out of such an instrument.

Neither does the act of 1849, which gives a married woman the power of a *feme sole* in certain cases, from which gifts by her husband are simply excluded, prevent the right of the husband to make, or his wife to receive from him, *provision for her support*. And a court of equity does not contravene this statute in the exercise of its equity powers to protect the interest of the wife as a *cestui que trust*, or perhaps a *ward in chancery*.

Although the equity of the wife growing out of the facts, may be considered a *trust*, it is not as such prohibited by the Revised Statutes respecting uses and trusts, because not enumerated therein, for the reason that it is a trust arising by *implication of law*, to which this statute does not apply.

In this case it is alleged and admitted by the demurrer that the conveyance was made to the defendant in pursuance of a previous agreement for both a good and valuable consideration, and that it was a suitable one, having regard to the property of the husband; equity will therefore sustain such a settlement, even if the plaintiff was a creditor or could claim a creditor's rights.

The defence that the trustee, after the purposes of his trust have been accomplished, retains no interest in the land conveyed to him, to enable him to litigate the claims of others, amounts to a denial of title in the plaintiff, and is a sufficient defence.

Heard General Term, Dec., 1863; decided Feb'y 13, 1864.
Before ROBERTSON and GARVIN, Justices.

THIS is an appeal from an order sustaining a demurrer to the second, third and fourth defences of the answer.

The complaint alleges, that on the 22d of October, 1855, William H. Brown, owning four lots in Twelfth street, New York, conveyed the same in fee to plaintiff in trust; that he has always since been, and is now, the owner of the same in fee and in possession; that defendant claims title in fee to a part of the premises; and plaintiff prays his title may be adjudged free from defendant's claim, &c.

The answer, besides a general denial, sets up three separate defences, to which plaintiff demurs. They are as follows:

1. Defendant alleges (as her second defence), that William H. Brown was her husband; that on the 11th day of July, 1849, he owned the premises now claimed by her; that he was then possessed of great wealth and of property in value far beyond the amount of his debts and liabilities;

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that before and after this time, she released her dower in large tracts of real estate mortgaged and conveyed by him; that, thereupon, "in performance of an agreement with her said husband to that effect, and in consideration of love and affection towards her, and of good and sufficient other meritorious, valuable and pecuniary considerations, &c., for the purpose of applying the same to her separate use," on the 11th of July, 1849, (being six years before the alleged trust conveyance to the plaintiff), her husband had conveyed the premises in question, with others, to her in fee by deed, "with full covenants of warranty and further assurance;" that this deed was at once recorded on her behalf, and she "immediately entered into possession" of all the property so conveyed, and "had and enjoyed to her sole separate use all the rents and profits thereof at all times since, (being upwards of six years,) until after the death of her husband, intestate, October 27, 1855," (such death being five days after the alleged conveyance to plaintiff); that the settlement of this property to her separate use "was no more than a reasonable provision for her by her husband, in view of his pecuniary circumstances, and was so meant and intended in good faith by him;" and that by reason of these matters, she is sole owner of the premises in question claimed by her.

2. Defendant alleges (as her third defence), that the plaintiff's alleged conveyance is a general assignment of the property of W. H. Brown, made for the benefit of creditors existing at its date, (Oct. 22, 1855); that all the claims of such creditors arose long after his deed of conveyance to defendant; that the assignment to plaintiff does not purport to convey the premises in question; that it did, however, convey to plaintiff a large amount of other property sufficient to pay all the creditors of W. H. Brown without selling any of the property mentioned in the complaint; that plaintiff has already sold and converted into money the greater part of the assigned property; that he

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now has in his hands more than sufficient money arising therefrom to satisfy all the debts of W. H. Brown; that, moreover, the greater part of the debts subsisting at the time of the assignment are barred by the statute of limitations; that W. H. Brown died five days after the assignment; that defendant was in the following month appointed his administratrix; that no property of his estate has yet come to her possession; that the trusts of plaintiff in the premises described in the complaint have been executed, and his alleged title to the lands in question has ceased; that said lands (except as conveyed to defendant) have descended to Arthur J. and William H. A. Brown, sons and the heirs at law of said W. H. Brown; and that the plaintiff prosecutes this action without their consent, and has no right of action in the premises.

3. Defendant (as her fourth defence), by way of counter claim, reiterates the allegations so set forth in the second and third defences, and besides alleges that W. H. Brown, having in July, 1849, conveyed to her specifically by deed, with full covenants, the premises she now claims, (for good and valuable considerations), with intent to settle the same upon her as her separate estate, and to vest in her an absolute estate therein, in fee simple, as before mentioned, afterwards, in October, 1855, he made a general assignment to plaintiff, in trust, of "all his lands, tenements;" that lately the plaintiff sets up a claim under this assignment to the premises so conveyed to her by deed, and claims to exercise acts of ownership over the premises, and to exclude defendant therefrom, and to sell and convey and transfer a valid title thereto, and give possession, &c., in derogation of defendant's deed and title, and the equitable rights and claims of defendant; and defendant prays, by way of equitable counterclaim, that through the equitable powers of this court, it may be decreed that W. H. Brown by his deed intended to convey said premises to and settle the same upon her, and she is thereby vested with a free-

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hold estate therein against any claim of plaintiff under the assignment aforesaid, &c.

To these three defences the plaintiff interposed a general demurrer, that they "do not constitute a defence."

MATHEWS & SWAN, attorneys, and
ALBERT MATHEWS, counsel for appellant.

I. The plaintiff having instituted an "action" by "summons and complaint," to compel the determination of defendant's claims to the lands in question, she has a right to set up her defences, whether legal or equitable, either in avoidance, or by way of counterclaim, the same as in any other action.

1. The "special proceeding" authorized by the Revised Statutes on the subject of "the determination of claims to real property" (in order to enforce the rights thereby created), is so far modified by the Code of Procedure that, in every "action" "by which a party prosecutes another party for the enforcement or protection of a right" which is given by the provisions of this statute, the pleadings on both sides must be subject to the same rules as govern in all other actions. (2 R. S. p. 312, § 1; *Code*, § 2, 449-468, § 69, 140-149; *Hammond* agt. *Tillotson*, 18 Barb. 332; *Mann* agt. *Provost*, 3 *Abbott*, 446; *The Mayor, &c.* agt. *Stuyvesant*, 1 N. Y. R., *per Johnson*, J., p. 44.)

2. Whether, therefore, the plaintiff's complaint is regarded as a legal action to enforce or protect his alleged right as created by the Revised Statutes, or an equitable action to remove the defendant's deed as a cloud upon his title; in either case the "defendant may set forth by answer as many defences and counterclaims as she may have, (connected with the subject of the action), whether they be such as have been heretofore denominated legal or equitable, or both. (*Code*, § 150; *Crary* agt. *Goodman*, 12 N. Y. 2 *Kern*, 266; *Phillips* agt. *Gorham*, 17 N. Y. 3 *Smith*, 270.)

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II. In the construction of the language employed by the defendant in her answer in the "statement of new matter, constituting her defence or counter-claim," the court will (on this demurrer) indulge in no presumption against her claim; but, on the contrary, will make the most liberal inferences to sustain the defences and counter-claim intended to be set forth. (*Foot agt. Sprague*, 12 *How. Pr. R.* 355.)

1. The plaintiff's demurrer is general, and therefore, even under the strict rule of the common law, would not have reached many defects of a pleading, which would have vitiated it if pointed out by special demurrer. Under this rule, for instance, a plea faulty for argumentativeness or duplicity was good on general demurrer. (*Spencer agt. Southwick*, 9 *Johns. R.* 314; *Wolf agt. Luyster*, 1 *Hall S. C. R.* 146.)

2. The strict rule of the common law, requiring allegations to be taken most strongly against the pleader, is abolished by the Code. (§ 140.)

3. The mode of pleading formerly existing at law and in equity is also abolished by the Code; and parties are now not permitted to state in the pleadings either the fictions formerly contained in pleadings at law, or the matters of evidence formerly contained in bills of discovery, &c. in equity. The parties must state only the facts constituting the cause of action or defence, according to their legal effect or operation, and not in their details. (*Code*, §§ 140, 142, 149; *Boyce agt. Brown*, 7 *Barb. Rep.* p. 80; *Pattison agt. Taylor*, 1 *Code Rep. N. S.* p. 175; *Dollner agt. Gibson*, 3 *Code R.* p. 153; *Williams agt. Hayes*, 5 *How. P. Rep.* p. 470; *The People, &c. agt. Ryder*, 2 *Kern. Rep.* pp. 439 and 441.)

4. The rules of construing pleadings, as defined by the Code, require that their "allegations shall be liberally construed, with a view to substantial justice between the parties;" and that "the court shall disregard any error or

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defect therein which shall not affect the substantial rights of the adverse party." (*Code*, §§ 159, 176.)

5. The plaintiff's demurer, therefore, reaches no defect in the answer (if any there be), unless it is made to appear that conceding all the facts therein stated to be true, they do not, "under any view of them," "constitute any defence or counter-claim whatever," or the "elementary constituents" of a defence or counter-claim. (*Richards* agt. *Edick*, 17 *Barb. Rep.* 260; *Graham* agt. *Camman*, 5 *Duer Rep.* 697; *The People, &c.* agt. *The Mayor, &c.* 8 *Abbott Rep.* 19; *Butterworth* agt. *O'Brien*, 24 *How. Pr. Rep.* 440.)

III. The "third defence" does "upon its face constitute a defence" to plaintiff's action, because it shows the plaintiff is not "the real party in interest" in respect to the cause of action alleged in the complaint. (*Code*, § 111, 144; *Palmer, assignee*, agt. *Smedley*, 28 *Barb. Rep.* 468.)

1. Assuming the facts stated in the complaint to be true, yet as (by reason of the allegations in the third defence) the plaintiff's trust in respect to the lands in question has been fully performed, he is now *functus officio*, and all his interest in the lands in question has ceased, and the legal title thereto has descended to the heirs at law of W. H. Brown, deceased. (1 *Rev. Stat.* p. 730, § 67; *Parks* agt. *Parks*, 9 *Paige Rep.* 107; *Bellinger* agt. *Shaffer*, 2 *Sand. V. C. Rep.* 293.)

2. Upon the same assumption, if, by reason of the plaintiff's having taken the lands upon trust to sell them for the benefit of the creditors of W. H. Brown, deceased, they are to be treated in equity as converted into personality, and distributable as such, then they pass to the defendant, as the administratrix of W. H. Brown, deceased, and the plaintiff has no title. (2 *Story's Equity Jurisprudence*, § 1212; *Bunce* agt. *Vandergrift*, 8 *Paige Rep.* 37; *Stagg's Ex'r's* agt. *Jackson*, 1 *Comst. Rep.* 206.)

3. To enable the plaintiff to maintain this action, he

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must prove the essential allegation in his complaint that he is "lawfully seized and possessed of the premises in question as owner in fee." The "third defence" distinctly puts this fact in issue, by alleging the plaintiff's title to have ceased, and the lands to have vested in other persons.

1st. An answer of title to property (whether real or personal), in a third person, (without even connecting the defendant therewith) is always a good defence where the plaintiff's cause of action is founded upon his own title. (*Harrison* agt. *McIntosh*, 1 *Johns. Rep.* 384; *Bloom* agt. *Burdick*, 1 *Hill Rep.* 130.)

2d. Thus even a tenant, notwithstanding the stringent rule which prevents a tenant from denying his landlord's title may show such title to have ceased. (*Evertson* agt. *Sawyer*, 2 *Wend. Rep.* 512; *Nellis* agt. *Lathrop*, 22 *Wend. Rep.* 121; *Despard* agt. *Walbridge*, 15 *N. Y. Rep.* 374.)

4. This defence is both substantial and meritorious.

1st. The plaintiff has not a scintilla of interest in the controversy he has provoked.

2d. A judgment in this action will be wholly nugatory as respects the real parties in interest, whether in favor of plaintiff or defendant. The defendant will not be estopped from claiming against the heirs at law, in whom the fee of the lands has vested. The heirs at law will not be estopped from claiming against the defendant.

3d. The plaintiff does not represent the heirs either in law or in fact. The court will not presume they will adopt a judgment, if in his favor, however beneficial to themselves. A court of equity can hardly be so false to humanity as to presume that the heirs at law would be guilty of the monstrous filial ingratitude of seeking to deprive their mother of a settlement made upon her by their father in his lifetime, upon abundant legal, equitable, valuable and meritorious considerations, which was followed by six years' quiet possession and enjoyment by

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her, and never disturbed or intended to be disturbed by the grantor.

IV. The "second defence" is a complete answer to the complaint. The facts therein stated establish an equitable title to the lands in question in the defendant. It is the duty of a court of equity to give it full effect, and recognize its validity.

1. The facts set forth in the defence fully entitle the defendant to invoke successfully the equitable powers of this court to establish her claim to the premises in question.

1st. There is no creditor or representative of creditors claiming as such adversely to the defendant, or seeking to impeach or invalidate her right and title.

2d. There is no heir at law or devisee claiming against her.

3d. There is no pretence that any wrong or injustice to creditors, or heirs at law, or devisees, is liable to be affected by the recognition and confirmation of her title as owner in fee of the premises.

4th. The plaintiff claims as naked trustee against the prior acts of his own grantor, done and accepted in good faith upwards of six years prior to the conveyance to himself as trustee.

5th. The settlement of the lands in question upon the defendant by her husband was reasonable and proper under the circumstances.

6th. It was meant and intended to be a perfect conveyance to vest in the wife a full title in fee to the lands in question.

7th. There is no suggestion or suspicion of fraud, bad faith, or undue influence. The conveyance was the result of a fair agreement between husband and wife, and the "pecuniary consideration" averred may be held to be a contribution from her separate estate. (Code, § 159.)

8th. It was founded upon the best possible considerations

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to sustain any act of any individual concerning property. (*Strong* agt. *Garlick*, 3 *Paige Rep.* 452; *Shepard* agt. *Shepard*, 7 *Johns. Chan. Rep.* p. 62.)

9th. It was evidenced by the most solemn formalities known to the law. The conveyance is a deed under seal, and contains full covenants of warranty and further assurance, and was recorded according to statute.

10th. The conveyance was followed by an immediate and continued change of possession, and a separate enjoyment of all the rents, profits and benefits during all the continuance of the lifetime of the husband and grantor, being a space of upwards of six years.

11th. There was never any attempt of the husband and grantor to disturb this separate title, possession and enjoyment, or in any manner to interfere with his wife's exclusive right thereto.

12th. The defendant's husband has long since died *intestate*. If, therefore, the plaintiff is permitted to recover, he robs the widow of her portion, and desecrates the grave of her deceased husband, by making him now the involuntary party to a fraud and outrage upon the helpless surviving parent of his children.

II. The well-settled rules governing courts of equity, for upwards of a hundred years, in determining the rights of married women in their dealings concerning property with their husbands, also entitle the defendant to invoke successfully the equitable powers of this court to establish and confirm her title to the premises in question. (*A. D.* 1734, *TALBOT, Chancellor*, *Slanning* agt. *Stiles*, 3 *Peere Wms. Rep.* 335; *A. D.* 1738, *HARDWICKE, Chancellor*, *Lucas* agt. *Lucas*, 1 *Atkins' Rep.* 270; *A. D.* 1823, *KENT, Chancellor*, *Shepard* agt. *Shepard*, 7 *Johns. Chancery Rep.* 57.)

1. The rule of the common law, which treats a conveyance from husband to wife as void, is solely a technical result from the necessity of two parties to a contract,

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while at common law husband and wife are one person. (1 *Blackstone Comm.* p. 442.)

2. This notion of the union and identity of husband and wife does not prevail in courts of equity, so as to incapacitate a wife from claiming as a *feme sole*, adversely to her husband, when necessary to subserve the ends of justice. In such tribunals she may sometimes appear against her husband either as a party to a suit, or as a witness, or as a party to an agreement, (whether executory or executed), or as a creditor, or even as a voluntary grantee or donee. (2 *Story's Equity Jurisp.* § 1368, 72, 73, 74, 75.)

3. The rights of married women form a favored head of equity jurisdiction; and courts of equity are sedulous to protect them in their dealings concerning property, and the provisions made by their husbands for their support in case of survivorship. (2 *Story's Equity Jurisp.* § 1429.)

4. A husband's conveyance of lands mediately to his wife, although for a nominal consideration, when made by the momentary intervention of a disinterested third person as a mere conduit of the title, is good even at common law. Nor is such a conveyance vitiated by expressing upon the face of the husband's deed such ultimate intent of the grantor. There is therefore neither reason or principle involved in the common law rule, that a deed immediately from husband to wife is void. (*Lynch agt. Livingston*, 6 N. Y. 2 *Seld. Rep.* 422.)

5. The intervention of a trustee is no longer deemed essential to sustain the wife's equitable rights under an agreement or conveyance from a husband to his wife. (2 *Ey. Jurisp.* § 1380; *Wallingford agt. Allen*, 10 *Peters' U. S. C. Rep.* 583.)

6. If it be deemed necessary to assume a constructive or "implied trust" in the husband, in order to give effect to his contract or grant in her favor, still such trusts are valid, and saved by exception from the sweeping opera-

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tion of the Revised Statutes. (1 *Rev. Stat.* p. 728, § 50; *Johnson* agt. *Fleet*, 14 *Wend. Rep.* 179.)

7. An *ante-nuptial* agreement is not necessary to sustain in equity a contract or grant made by the husband in favor of his wife. On the contrary, where one exists, a court of equity will grant relief to a wife against its terms, in order to sustain a *post-nuptial* conveyance, where the ends of justice require it. (*Shepard* agt. *Shepard*, 7 *Johns. Ch'y R.* 57.)

8. A court of equity in like manner recognizes the relationship of debtor and creditor between husband and wife, (irrespective of any *ante-nuptial* contract or trustee), in order to find a consideration to uphold contracts between them. The wife may also in equity recover her debt out of his estate after his death. (2 *Story Eq. Jurisp.* § 1373; *Slanning* agt. *Style*, 3 *Peere Wms. Rep.* 338; *Gardner* agt. *Gardner*, 22 *Wend. Rep.* 526; *Devin* agt. *Devin*, 17 *How. Pr. R.* 514.)

9. The separate property of a wife, in respect to which a court of equity will regard her as a *feme sole*, may also be acquired directly from her husband as a gift, and wholly created after coverture, without any consideration whatever. (*Slanning* agt. *Styles*, 3 *Peere Wms. R.* 338; *Calmady* agt. *Calmady*, *Ibid.* 339; *Ryder* agt. *Hulse*, 24 *N. Y. Rep.* 379.)

10. Release of dower is a meritorious consideration to sustain a contract between husband and wife. (*Strong* agt. *Garlick*, 3 *Paige Rep.* 452.)

11. Courts of equity will surely, therefore, sustain and give effect to a conveyance of property or deed of land from a husband directly to his wife, (against his heirs at law or assignee), as a reasonable settlement for her, where the quantum thereof is suitably proportioned to his estate, and the consideration is meritorious, and no claims of creditors intervene, and the intention of the parties is clearly expressed. (*Shepard* agt. *Shepard*, 7 *Johns. Ch'y*

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Rep. 57; Wallingford agt. Allen, 10 Peters' U. S. C. R. 583; Simmons agt. McElwain, 26 Barb. Rep. 419; Winans agt. Peebles, 31 Barb. Rep. 380.)

3. The uniform language of courts of equity, for upwards of one hundred years, furnishes unmistakable evidence of an unvarying principle of action, under which the defendant has a right to have her title sustained in this court as valid and effectual.

1. "In this court gifts between husband and wife have often been supported, though the law does not allow the property to pass." (*Per Lord Chancellor Hardwicke, in Lucas* agt. *Lucas*, 1 *Atk. R.* 271.)

2. "It appears to have been asserted that a husband and wife could not after marriage, contract, for a bona fide and valuable consideration, for a transfer of property from the husband to the wife, or trustees for her. The doctrine is not so either here or at law." (*Per Lord Chancellor Eldon, in Arundel* agt. *Phipps*, 10 *Vesey R.* 148.)

3. "The court expects satisfactory evidence of an act constituting a transfer of the property and sufficient transmutation of possession." (*Per Sir Thomas Plumer, in Walter* agt. *Hodge*, 2 *Swanst. R.* p. 112.)

4. "The deed was undoubtedly void at law, for the husband cannot make a grant or conveyance directly to his wife during coverture." * * "The consideration for the deed to the wife was very meritorious. It was 'natural affection, and to make a sure maintenance for the wife in case she should survive her husband.'" * * "The deed to the wife of certain lands being part and parcel of his estate for and during her widowhood, was therefore no more than a just and suitable provision, and one that a court of equity can enforce consistently with the doctrine of the cases." * * "I conclude, accordingly, that the deed from the husband to the wife may and ought in this case to be aided and enforced by this court." (*Per Chancellor Kent, in Shepard* agt. *Shepard*, 7 *John. Chy. R.* 60, &c.)

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5. "Agreements between husband and wife during coverture, for the transfer from him of property directly to the latter, are undoubtedly void at law. Equity examines with great caution before it will confirm them. But it does sustain them when a clear and satisfactory case is made out that the property is to be applied to the separate use of the wife. Where the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit, or of their family; or which has been appropriated by him to his uses. Where the husband is in a situation to make a gift of property to the wife, and distinctly separates it from the mass of his property for her use. Either case equity will sustain, though no trustee has been interposed to hold for the wife's use." (Per WAYNE, J., in *Wallingford* agt. *Allen*, 10 *Peters' U. S. C. Rep.* 594.)

6. "It is well settled that a post-nuptial agreement between the husband and wife, by which property is set apart for her separate use, will be sustained in equity though void at law." (Per Chancellor WALWORTH, in *Garlick* agt. *Strong*, 3 *Paige R.* 452.)

7. "In equity, gifts to the separate use of a married woman, as well those presented by the husband in his lifetime as those given by third persons, with or without the intervention of trustees, expressly named, will be protected in cases where they have been made in good faith and the rights of creditors are not infringed." (Per V. C. McCOUN, in *Neufville* agt. *Thomson*, 3 *Edw. V. C. R.* 93.)

8. "Although a deed from a husband directly to his wife is void in law, yet where the conveyance of the husband is for the purpose of a making a suitable provision for the wife, equity will lend its aid to enforce the provision where the rights of creditors do not interfere." (Per PAIGE, J.; in *Strong* agt. *Skinner*, 4 *Barb. Rep.* 552.)

9. "It is true that the deed from the husband to his wife was void at law, for a husband cannot during covert-

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ure make a grant or conveyance to his wife. But such a grant will be upheld in equity when it is necessary to prevent injustice." (*Per HARRIS, J., in Simmons agt. McElrath, 26 Barb. 422.*)

10. "Equity has always upheld conveyances which were void at common law, where equity and justice demanded it. And this whether the estate conveyed were a legal or an equitable estate." (*Per JOHNSON, J., in Winans agt. Peebles, 31 Barb. Rep. 380.*)

V. The "fourth defence" sets forth a good cause of action by way of counter-claim against the plaintiff, which is a perfect bar to the action.

1. The defendant wishing to have established her equitable estate in the premises in question, (which she has derived from her husband,) and to have the apparent claim of the plaintiff and his alleged legal estate (which he has derived from the same source) removed as an existing cloud upon her title, has a right to demand the interposition of a court of equity to shield her against the plaintiff's unjust action. (*Tisdale agt. Jones, 38 Barb. Rep. 523.*)

2. This being her right, it became her duty, when prosecuted by the plaintiff, to set up these matters by way of counter-claim in this action, (if she desired to invoke the equitable powers of the court,) and not to vex the plaintiff with a separate action. (*Hunt agt. Farmers' Loan & Trust Co. 8 How. P. Rep. 416; Foot agt. Sprague, 12 How. P. Rep. 355; Winfield agt. Bacon, 24 Barb. Rep. 160.*)

3. If there be any doubt as to the effectiveness of the "second defence" as a mere negation or avoidance of the plaintiff's cause of action, the facts there alleged, and the additional matters which constitute together this "fourth defence," being set forth affirmatively by way of counter-claim, fully established the defendant's right, not only to defeat the plaintiff's action, but also to have an affirmative judgment in her favor. (*Code, Sec. 274, Sub. 2.*)

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1. See in this connection *supra*, "fourth point," subdivision 1, page

2. The plaintiff is a mere volunteer, having no meritorious ground for resisting the defendant's claim. His trust having expired and his estate having ceased, he has no rights which a court of equity is bound to respect.

3. The conveyance to the plaintiff does not purport or assume to convey the lands in question.

4. The husband never contemplated disturbing the defendant's title or possession by the general assignment to the plaintiff.

5. The husband never revoked, or attempted to revoke, or manifested any intention to revoke his own deliberate act in executing and delivering his deed of these lands to his wife.

4. Additional rules of law and equity, which are applicable to the case of the defendant, asking affirmative relief against the plaintiff, fortify the defendant's right to a judgment in her favor.

1. The plaintiff does not stand in the position of a bona fide purchaser, and cannot, as such, resist defendant's claim. (*Heath agt. Westervelt*, 2 *Sand. Rep.* 110; *Vanheusen agt. Radcliffe*, 17 *N. Y. Rep.* 580.)

2. The alleged conveyance to plaintiff by W. H. Brown of the lands in question, while he was out of possession thereof, was void by statute. (2 *Rev. Stats.* p. 691, Sec. 6. *Burhans agt. Burhans*, 2 *Barb. Chy. R.* 398.)

3. If the court should hesitate to uphold defendant's deed as an operative conveyance, they will (against the plaintiff claiming the legal title as assignee of W. H. Brown) still enforce and give effect to the contract of W. H. Brown contained in the "covenants of warranty and further assurance" expressed in the deed, and founded upon good considerations. (*Livingston agt. Livingston*, 2 *Johns. Chy. Rep.* 537.)

4. The husband having received full consideration for

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the conveyance, both he and the plaintiff, as his alleged grantee, are estopped in equity from now claiming, adversely to the husband's deed and covenant, that such deed is void at law. (*Mount agt. Morton*, 20 *Barb. Rep.* 131; *Erwin agt. Downs*, 15 *N. Y. Rep.* 575.)

VI. The order made at special term sustaining the demurrer should be reversed, with costs of this appeal and of the demurrer; and judgment should be ordered for the defendant upon the second, third, and fourth defences.

CHARLES M. DA COSTA, *attorney*, and
N. DANE ELLINGWOOD, *counsel*, for respondent.

I. The matters so secondly set up in the answer of the defendant, do not constitute a sufficient legal claim to the premises in question in this suit; inasmuch, as the deed under which she claims (it being a deed from husband to wife) is void at law; nor do they constitute a sufficient equitable claim.

1. A married woman may take or hold property either in her own right, or as a *feme sole*, or as a beneficiary of a trust; but she can neither take, nor hold property, nor claim any interest therein, in any other way.

a. If she claims to hold property as a *feme sole*, it must be under the act of 1849, which in terms, expressly precludes any gift or grant from husband to wife; or

b. If she claims as a beneficiary of a trust, it must, if such claim arose subsequent to the passage of the act of 1849, be under or by virtue of some *express* trust; all other trusts, except such as result by operation of law, being abolished.

2. In her answer, the defendant does not claim any interest in the land in question under an express trust; but sets up a claim to such land, under and by virtue of a deed to her from her husband, executed subsequently to the passage of the act of 1849.

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It can not be assumed, that this court will exercise its equitable powers to sustain such a claim in contravention of an express statute.

II. The matters thirdly alleged in the said answer, set up a claim to lands, other than the land described in the complaint, and in which parties, other than those who are parties to the present suit, have or pretend to have some interest. Such matters cannot be regarded as responsive to the complaint, or as constituting any claim whatever, to the land in question in this cause.

III. The matters fourthly stated in the said answer, do not constitute a counter-claim, as is therein alleged. Such a claim can exist only in actions arising upon personal contracts or undertakings. (*See Code, § 150.*) Nor can such matters be regarded as constituting an equitable claim, adverse to the legal claim of the plaintiff (*see 1st point and the subdivisions of that point.*)

IV. If, however, an equitable claim could be set up, adverse to the express prohibition of the statute of 1849, the defendant in her answer has failed to make out, with sufficient particularity, a case for equitable relief. (*Field agt. Holbrook, 6 Duer, 605.*)

V. Besides, notwithstanding the close blending of legal and equitable actions under the provisions of the Code, a question of great doubt exists, whether in a *legal* action for the purpose of determining the title to lands under the statute, an *equitable* adverse claim can be set up by way of answer. It is clear, however, that if the defendant has an equitable claim, it might be set up by way of a cross suit. *Mayor, &c., of New York agt. Stuyvesant, 17 N. Y. Rep. p. 34, 44.*)

By the court, ROBERTSON, J. This action, even if only the same relief were sought in it, as was formerly given under the statute respecting the determination of claims to land (2 R. S. 313, § 3), would be subject to the same rules as all

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other actions. (*Code*, § 449, *Hammond* agt. *Tulloson*, 18 *Barb. R.* 332; *Man* agt. *Provoost*, 3 *Abb. Rep.* 446.) The same defences to defeat the right to such relief might be set up by the defendant. Such statutory proceeding evidently included only the determination of legal titles, as the defendant was to be barred only from claiming an estate of inheritance or freehold in possession, reversion or remainder in the premises. It did not include the setting aside of a conveyance upon the ground of the grantor's incompetency, (*Bridges* agt. *Miller*, 2 *Duer Rep.* 683), or the rights of parties under a contract to convey. Were the action so limited and the right claimed by the defendant in her second and fourth defences purely equitable, they might possibly be insufficient as defences.

But the relief demanded in the complaint in addition to that given under the statutory proceeding is that the plaintiff's title may be quieted and adjudged free and clear from any right claimed by the defendant and other relief.

This includes the removal of the defendant's claim, whatever it may be, from interfering with the title. It is by no means clear that the right set up by the defendant is not practically as much a legal one as the plaintiff's. The language of the cases where deeds from a husband to a wife have been sustained in equity is by no means clear as to the mode in which the wife's rights are to be protected or enforced, unless by repelling hostile claimants whenever they commenced an attack in a suit at law by an injunction in equity. Nor does it seem to be settled whether a second deed from the husband, through the intervention of a third person, is necessary to complete the wife's title: at all events, the defendant has the same right to resist the attack of the present plaintiff upon her title, as if it were a legal one. He is neither a *bona fide* purchaser nor clothed with the rights of a creditor. He is only a voluntary trustee created by the defendant's hus-

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band, and having no more rights than he would have had to interfere with the defendant's estate or interest. The defences made therefore were proper if they were sufficient in law. The complaint in this case, however, is defective, as one in an action to remove a cloud from the plaintiff's title, because it does not show the nature of the defendant's claim. (*Heywood* agt. *City of Buffalo*, 14 N. Y. R. 534.) Since the law will not interfere to prevent speculative injuries. (*Scott* agt. *Onderdonk*, 14 N. Y. R. 9.) If it had simply stated such claim to arise from a deed from the defendant's husband to her on the face of which their relation appeared, it would have been demurrable, as the defect, if any, appeared on its face. (*Coz* agt. *Clift*, 2 N. Y. R. 118; *Ward* agt. *Dewey*, 16 N. Y. R. 519; *Fleetwood* agt. *City of New York*, 2 *Sandf. R.* 475.) If such deed, although *prima facie* void at law, could be sustained by extrinsic facts, the plaintiff would be bound to deny their existence in order to make the defendant's claim void. This defect, however, cannot be taken advantage of as regards the counter-claim. (*Graham* agt. *Dunnigan*, 6 *Duer R.* 629.)

The first defence demurred to sets up that the defendant's husband when entirely free from embarrassment for the purpose of applying the same to the separate use of the defendant conveyed to her in fee simple a portion of the property set out in the complaint which is specifically described by deed duly acknowledged and recorded. It also alleges that he did so in performance of an agreement to that effect with the defendant, and in consideration of his love and affection for her, and for other meritorious, valuable and pecuniary considerations. It further alleges that such settlement was no more than a reasonable provision for the defendant, in view of the pecuniary circumstances of her husband, and was so meant by him. Also that he was a man of great wealth, and the defendant had released her dower in large tracts of land. There is no

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allegation that the release of such dower formed any part of the consideration for such settlement or any part of the agreement on which it was made.

If such second defence is not sufficiently definite, or certain in furnishing the details of the agreement for the execution of the settlement or the pecuniary consideration of it, the remedy of the plaintiff is to move to make it so, until he does so, it is to be presumed he understands the entire nature of them, particularly on demurrer where he claims whatever they were, such settlement forms no bar to his recovery, which is the matter now to be determined.

The voidness at law of a deed directly from a husband to a wife, which is the highly artificial result of the technical theory of their being but one person (1 *Bl. Com.* 442,) does not interfere with equitable rights which may grow out of such an instrument, they being capable in equity of being considered two persons. (2 *Story Eq. Jur.* §§ 1368 to 7375.) Such result at common law could always be obviated by interposing a stranger to accept a deed from the husband and give one to the wife. That there was no policy of the law to be carried out by defeating a deed directly from the husband to the wife is evident from the harmlessness of a recital in a conveyance to a stranger by the husband that it was for the purpose of conveying to the wife. (*Lynch agt. Livingston, 6 N. Y. R. 422.*)

It has been indirectly suggested rather than seriously urged, that the statute of 1849 (*Sess. L. 1849, 528, § 1*), which empowers a married woman to take, hold, and convey as a *feme sole*, property derived from any one but her husband, may by implication deprive her of the right of acquiring any property or interests by the gift of her husband, although only to be enforced in equity. Whether it is intended to carry this doctrine so far as to deprive her

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of any rights she might acquire as purchaser or creditor does not appear.

It would be sufficiently daring if it took away from all husbands, however wealthy, the right of making provisions for the support of their wives. The title of the statute is "An Act for the more effectual protection of the property of married women," (*N. Y. Sess. Laws*, 1848, *Ch.* 200) : not to restrict or limit their rights. The section in question gives a married woman the power of a *feme sole*, in certain cases from which gifts by their husbands are simply excluded.

The strange inference, that such a statute meant to take away the right of a husband to make, or a wife to receive from him, a provision for her support, needs no further argument to refute it, than the bare statement of the provision. (*Powers* agt. *Lester*, 17 *How. P. R.* 413.) But it is seriously argued that this court should not exert its powers in equity "to sustain a claim in contravention of an express statute." How a court can do so when it is only asked as a court of equity to protect the interest of a wife as a *cestui que trust*, or perhaps a ward in chancery, and not establish any powers in her as a *feme sole* over the subject of the trust, I am at a loss to perceive.

Another question, by no means novel, has been raised in this case, that any equity of the wife growing out of the facts stated in the second defence must be a trust, and as such, prohibited by the Revised Statutes respecting uses and trusts, (2 *R. S.* 727, § 45,) because not enumerated therein. One of such provisions (§ 50) expressly declares that the preceding sections shall not apply to *trusts* arising "by *implication of law*," and the next section prohibits a resulting trust in a particular case. The 54th section of the same statute protects the rights of an innocent purchaser for a valuable consideration against an *implied* or resulting trust. Thus in the strongest manner recognizing

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and upholding implied trusts. (*Johnson agt. Fleet*, 14 *Wen. R.* 179.)

Nothing, therefore, remains to be considered except what rights a wife derives by a settlement made by a husband upon her, in consideration partly of his affection for her, and partly of pecuniary considerations, although by an imperfect instrument, but executed with intent to carry out a previous post-nuptial agreement. The intervention of a stranger as a party to be contracted with, in order to sustain a wife's rights as her trustee, is not necessary in equity, which would thereby become as rigid and technical as the common law. (2 *Story Eq. Jur.* § 1380, *Wallingford agt. Allen*, 10 *Peters' U. S. R.* 583.) Nor is any antenuptial agreement indispensable as a consideration. (*Shepard agt. Shepard*, 7 *John. C. R.* 60; *Garlick agt. Strong*, 3 *Paige, Rep.* 452; *Neufville agt. Thomson*, 3 *Edu. V. C. R.* 93; *Strong agt. Skinner*, 4 *Barb. R.* 552; *Simmons agt. McElwain*, 26 *Barb. Rep.* 417.) The language of the authorities is, that, in a proper case, (*Shepard agt. Shepard, ubi supra*,) where the consideration was meritorious or to prevent injustice, or where equity demands it, (*Simmons agt. McElwain, ubi supra, and Winans agt. Peebles*, 31 *Barb. R.* 380,) where the rights of creditors do not intervene, mere affection and a desire to provide for the wife suitably, according to the husband's means, are sufficient to sustain it. (*Shephard agt. Shephard, Wallingford agt. Allen, Garlock agt. Strong ubi sup.*) Some valuable consideration proceeding from the wife on the faith of such promised settlement seems to be necessary where creditors intervene. (*Wickes agt. Clark*, 3 *Edu. V. C. R.* 58.) The same rule prevails in favor of the husband. (*Livingston agt. Livingston*, 2 *J. Ch. Rep.* 537; *Jaques agt. Metho. Epis. Ch.* 17 *John. Rep.* 548.)

In this case it is alleged in the second defence, that the conveyance was made to the defendant in pursuance of a previous agreement, for both a good and valuable consid-

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eration, and that it was a suitable one, having regard to the property of the husband; this is admitted by the demur-
rer, and equity will therefore sustain such a settlement, even if the plaintiff was a creditor or could claim a creditors rights. An agreement to release dower may be such a sufficient valuable consideration to sustain it, even as against creditors, as I have had occasion to hold recently at special term (*Manhattan Company* agt. *Slate, et al.* MS.); but it is not set forth to have been one in this case. The allegation of releasing dower is entirely isolated, is not connected with, nor does it refer to any other, and might be stricken out without prejudice.

The order appealed from, therefore, in so far as it sus-
tains the demurrer to the second defence, is erroneous.

As the same matters are set up as a basis of equitable relief in the fourth defence, by way of a counter-claim, and relate to the land or the defendant's claim thereto, as the subject of the action, such counter-claim sets forth a good cause of action to prevent the plaintiff from embarrassing the defendant's equity with his legal conveyance. (*Tisdale* agt. *Jones*, 38 *Barb. R.* 523.) The fact that the plaintiff's action is a substitute for a former special proceeding (if it be so exclusively, and not one to remove a cloud upon the title), does not deprive the defendant of the right granted by the Code (§ 150) of setting up equitable defences in any kind of actions. (*Crary* agt. *Goodman*, 12 *N. Y. R.* 266; *Philips* agt. *Gorham*, 17 *N. Y. R.* 270.)

The demurrer to this defence is also not well taken.

The third defence presents simply the question, whether a trustee, after the purposes of his trust have been accom-
plished, retains any interest in land conveyed to him to enable him to litigate the claims of others?

A great many allegations unnecessary to raise that ques-
tion, are contained in this defence: such as the priority in time of the conveyance to the defendant, to the accruing of any claims of any creditor of her husband represented

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by the plaintiff; the barring of many debts of his by the statute of limitations, and the like.

The important allegation is contained in it, that the plaintiff has in his hands more than sufficient money, proceeds of sales by him of part of the assigned property, to satisfy all the *legal, subsisting, and outstanding debts of the assignor*. If it clearly appeared by such defence, that such debts did not include those barred by the statute of limitations, it would be insufficient, since the plaintiff's trusts do not cease by the running of the statute against such debts. But it does not; the allegation of the running of such statute is mere surplusage, and might be stricken out without prejudice. The language of the statute is clear and peremptory, that the estate of the trustees of an express trust shall cease when the purposes for which such trust has been created shall cease. (1 R. S. 730, § 67.)

A trustee therefore only takes so much of the entire legal ownership of the land as is necessary to carry out the trusts. His interest is contingent, and leaves the general ownership to remain with his grantor and his heirs or assignees. A reconveyance after the trusts are fulfilled is unnecessary. The property reverts to the owner, or rather becomes divested of the incumbrance of the trusts, as in case of a mortgage paid. This defence, therefore, amounts to a denial of title in the plaintiff, which is sufficient. (*Harrison agt. McIntosh*, 1 J. R. 384; *Bloom agt. Burdick*, 1 Hill R. 130.) The order appealed from was therefore erroneous in sustaining the demurrer to the third defence.

The order appealed from must therefore be so modified as to give judgment for the defendant against the plaintiff as to the property specified in the second and fourth defences upon the issues made by the former, and the counter-claim contained in the latter, and as to the plaintiff's whole cause of action upon the third defence, instead of judgment for the plaintiff upon the demurrer, with liberty to the

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plaintiff to withdraw his demurrer, and reply in twenty days to those defences upon paying the costs of such demurrer at special term.

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NEW YORK COMMON PLEAS.

Moses Parker agt. Frederick Link.

Under the 37th rule of this court, the moving party must, within ten days after settlement of the case, file with the clerk of the court a *copy of the case as settled, and the original papers containing the case and amendments as they came from the judge or referee.*

New York Special Term, February, 1864.

MOTION by defendant to set aside an order obtained by the plaintiff that the case made in this cause be deemed abandoned.

DALY, F. J.—Within the ten days required by the thirty-seventh rule, the attorney for the defendant filed with the clerk a correct copy of the case as settled by the referee, after which the plaintiff's attorney, upon an affidavit that the rule had not been complied with, obtained an order that the case be deemed abandoned.

The defendant now moves to set this order aside, and the plaintiff insists that the filing of a case, within the meaning of the rule, is filing the case and amendments as served with the alterations or corrections made by the referee, and not a copy of the case as settled.

As there appears to be some doubt as to what is the correct course under this rule, it may be as well to examine what course was pursued before the rule was adopted.

The practice of reviewing questions arising upon the evidence, upon a case made by the parties and settled by the judge, was first introduced by the 6th rule of the

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supreme court of January, 1799. (*Coleman & Caines' Cases*, p. 11.)

Before the adoption of that rule, the English practice prevailed of hearing the motion upon the judge's report of the evidence, which, upon application, was furnished by him or by his clerk. (*Tidd's Practice*, 914, *ninth London edition*; *Wyche's Treatise on the Practice of the Supreme Court of New York in 1794*, p. 176.)

By the rule of 1799, the moving party was required, within a certain number of days, to make up and serve upon the opposite party a case, and the other party had a given number of days within which to serve amendments. If amendments were served, the moving party notified the other to appear before the judge who tried the cause, and who, by the rule, was required to settle the case as he should "deem to consist with the truth of the facts." The moving party then gave notice of argument, and when the motion was called on, copies of the case, as settled, were delivered by him to the opposite party and to the court.

An unfair advantage having been taken of the practice which made it obligatory only to serve the case as settled upon the bringing on of the argument, the court, in *Peck agt. Peck*, (14 John. R. 219,) held that a copy of the case as settled should be served upon the opposite party at or before the time of serving notice of argument, and the court afterwards provided by rule that in all enumerated motions the party whose duty it was to furnish the papers should serve with his notice of argument copies of all the papers upon which he intended to move; and which provision still continues in force. (*Rule 42.*)

Under this practice it was in the power of the moving party to create delay, by keeping the case in his possession after it was settled, or, if disposed to act unfairly, to mislead the other party, as in *Peck agt. Peck, supra*, by assuring him that it was not yet settled.

The object of the 37th rule, therefore, was to compel

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him to file it with the clerk in ten days after settlement, under the penalty of its being declared abandoned. The ten days, by the rule, are computed from the time of the settlement, which is, when the case is settled by the judge, in the presence of the parties, or when the case, with the allowed amendments, or the corrections made by the judge, and delivered by him to the moving party, or, as is the habit in this court, to the clerk of the court. The party making up the case is then entitled to the possession of it for at least ten days, that he may prepare the copy of it as settled, which, under the forty-second rule, he is required to serve upon the opposite party eight days before the time of noticing for argument; and before the ten days have expired, as I understand the rule, he is to file the original paper, that is the case and amendments as they came from the judge or referee with the corrections or allowances as made by him, with the clerk. The object of this provision is to enable the other party to know, in ten days after the case is settled, what amendments the judge or referee has allowed, or what corrections he made, that he may have the means of ascertaining whether the copy of the case which is served upon him for the argument, is a correct transcript of the case or not. It facilitates the object of the rule, to file, at the same time, a transcript or copy of the case as settled, and serve upon the opposite party a notice that the case has been filed. This enables him in ten days after the settlement, to compare the transcript or copy on file of the case, as settled, with the original papers, and this course has been pursued for many years by nearly all the practitioners in this court.

The defendant, therefore, was in error in supposing that a copy of the case as settled was all that he was required to file, and that he was entitled to keep the original papers in his own possession. But, as he acted in good faith, and in conformity with what was declared to be the practice in an elementary work (*Whittaker's Practice*, p. 734, 2d ed.),

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he will be relieved without terms, on filing with the clerk the original papers, within five days from the entry of the order. An *ex parte* order may be entered vacating the order declaring the case to be abandoned.

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SUPREME COURT.

THE PEOPLE *ex rel.* JOHN LUMLEY and FREDERICK FOX agt. MORGAN LEWIS and others, Commissioners of Highways of the town of Cherry Valley.

An assessment of damages caused by laying out a highway, by commissioners appointed by the county court (2 R. S. 5th ed. 397, § 83), is not annulled or invalidated by applying for a jury under § 85, to re-assess such damages; nor is the original assessment affected, where the proceedings to re-assess the damages are discontinued, or the jury fail to agree. The award of the commissioners is in effect a judgment in favor of the owners of the land against the town, and is final and conclusive until reversed on *certiorari* or vacated by a re-assessment actually made.

Where the jury fail to agree on a re-assessment of such damages, a new jury may be summoned and impaneled, before whom the same proceedings shall be had for such re-assessment, as might have been had before the first jury.

Where no proceedings were taken for eleven months to call out a new jury after the first failed to agree, *held* that the party applying for such re-assessment, had abandoned the same.

Onondaga General Term, April, 1863.

Before ALLEN, MULLIN, MORGAN and BACON, Justices.

AN alternative mandamus was issued, directed to the defendants as commissioners of highways of the town of Cherry Valley, setting forth the proceedings whereby a highway was laid out in the town, and commanding the defendants to open the highway or show cause, &c.

The defendants made a return to the alternative writ, alleging three distinct grounds or reasons why they refused to open the highway, as follows: 1. That it was laid through an orchard without the consent of the owner. 2.

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That it was laid through a garden without the consent of the owner. 3. That two of the owners of lands over which the highway was laid, had appealed from the original assessment of their damages, and applied for a jury from an adjoining town to re-assess the same, and the jury drawn and impaneled for that purpose had failed to agree on a re-assessment. And the defendants alleged that they had no power, as they were advised to open the highway until the said damages had been re-assessed; and as a reason for not procuring a re-assessment thereof, the defendants also alleged that they had "no power or authority by the laws or statutes of this state to cause the said damages to be re-assessed," and that "there is no law or statute of this state authorizing in any manner, the drawing or procuring of a second jury to re-assess such damages, after one jury has been duly drawn and heard the case, and failed to agree upon the amount of damages to be re-assessed."

The relators plead to the return, denying that the highway was laid through an orchard, or through a garden.

The issues of fact were tried at the Otsego circuit in October, 1861, before Mr. Justice E. DARWIN SMITH and a jury, and a verdict rendered deciding all the issues specifically in favor of the relators. The relators then applied at the Cortland special term in January, 1862, before Mr. Justice MASON, on the pleadings and verdict for final judgment: and judgment was ordered accordingly for costs and a peremptory mandamus, against the defendants as such commissioners of highways. The defendants appealed to the general term.

The following opinion was delivered at special term:

MASON, J. This is, in my judgment, a very clear case for the relators. The damages have been assessed, and that assessment stands as the measure of damages to be paid for this road, unless a re-assessment by a jury is procured. The clerk will enter an order that a peremptory mandamus issue in this case. And as the defendants have

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made untenable issues of fact, and compelled the relators to go to the circuit and try them, and as they have made throughout an untenable defence, I think the relators are entitled to a judgment against them for costs, and I direct with costs to be taxed. (18 Wend. 534; 10 Wend. 598.)

DE WITT C. BATES, *for appellants.*

E. COUNTRYMAN, *for respondents.*

By the court, MULLIN, J. As I am of the opinion that the judgment in this case should be affirmed on the merits, I have not examined the question whether the case could be properly brought into this court by appeal.

The proceedings to lay out the road in question and to assess the damages by reason of such laying out, are concededly regular up to and including the assessment by the commissioners appointed by the county court. The owners of the land over which the road ran, and the highway commissioners, had each the right to have the damages re-assessed by a jury of an adjoining town, upon complying with the provisions of the statute. (2 R. S. 5th ed. 397, § 85.) Two of the owners of the land applied in the manner prescribed for a re-assessment, and such proceedings were had that a justice of the peace impaneled a jury, and the jury proceeded to examine the premises and to take evidence, but being unable to agree, separated without agreeing on a verdict, or in any manner fixing the damages to be paid to those applying for a re-assessment. Eleven months have elapsed, and no other jury has been summoned, and now the commissioners of highways refuse to open the road because such damages have not been re-assessed. The commissioners of highways are of the opinion that the application for a re-assessment has the effect of annulling the assessment made by the commissioners, and hence, until a re-assessment, the owners of the land can have no compensation, and as the statute (2 R. S.

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5th ed. 396, § 82) forbids the opening of the road until the damages have been assessed, the commissioners of highways are not at liberty to open the road. In this I think the commissioners of highways mistaken.

It was not the intention of the legislature to annul the assessment made by the commissioners, until there was a re-assessment by the jury. There is nothing in the statute which prevents the commissioners of highways, if they apply for a re-assessment, from omitting to prosecute it. And, if that may be done, they may at any time deprive the owners of the land of all compensation. No such result could have been intended. A glance at the provisions of section eighty-five will show that it is the party applying for a re-assessment that has the control of the proceedings, and not the other party to them, who is satisfied with the damages as fixed by the commissioners. Hence, such party has no means given him to protect himself against a discontinuance by the party applying. The award of the commissioners is, in effect, a judgment in favor of the owners of the land, against the town; it is final and conclusive until reversed or vacated, or a new judgment is rendered by the jury by whom a re-assessment is made. It is a valid re-assessment that annuls the assessment of the commissioners. If the proceedings to re-assess are discontinued, or reversed on certiorari, or the jury fail to agree, the assessment stands subject to be annulled on re-assessment regularly and properly made.

The commissioners of highways, and their counsel, were led to the conclusion that proceedings to open the road must terminate, because the jury had failed to agree on a verdict, by assuming that another jury could not be called under the statute, as it makes no provision for more than one jury. If the counsel and commissioners were right in supposing that there is no provision of the law authorizing a second jury to be called when the first failed to agree, I should be inclined to hold, that when the legislature

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directed that damages for property taken for public use should be assessed by a jury, it must be held in the absence of an express prohibition, that juries should be summoned from time to time, and as often as was necessary, until a valid appraisal was made. When the law gives a right, and a mode of enforcing it, the party has the right in the absence of legislative prohibition to pursue the prescribed mode until the end is effectually obtained.

But the counsel and commissioners are mistaken in supposing that the legislature have not authorized the summoning of a second jury in cases of this kind, when the first fail to agree. In 3 R. S. 5th ed, 869, § 28, it is provided: when any jury shall be impanelled to try any issue, to make any inquiry, or *to assess any damages*, if they cannot agree after being kept together for such time as shall be deemed reasonable by the court, or officer before whom they shall have appeared and been impanelled, such court or officer may discharge them, and issue a precept for a new jury, or order another jury to be drawn, as the case may require, and the same proceedings shall be had before such new jury as might have been had before the jury so discharged.

No stress is laid by the counsel upon the fact that the jury separated without the formal declaration by the justice, that he discharged them because they were unable to agree. In the absence of evidence, that the jury designedly separated in defiance of the officer, I think we must intend it was done with his assent and authority. The proceeding was one to assess damages, therefore, within the very terms of the section cited. The justice was an officer before whom the jury appeared and were impanelled, and as the jury could not agree after a reasonable time had been taken for that purpose, the very case had arisen in which it was proper to discharge them and summon another jury.

It was the duty of the persons applying for a re-assess-

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ment to have seen that another jury was summoned, and an assessment made. They have omitted for eleven months to do so, and it seems to me they should now be held to have abandoned the application, and, as there has been no re-assessment, the original assessment must stand. And as the condition of the statute which requires the assessment to be made before the road is opened or worked, has been complied with, it was, and is the duty of the commissioners of highways to proceed and open the road.

I am of the opinion that the judgment of the special term should be affirmed with costs.

Judgment affirmed.

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SUPREME COURT.

THOMAS WATSON agt. ALBERT MORTON.

Where a copy of a summons is served without any indication on it of a United States revenue stamp—such stamp being properly attached to the original summons, the action, on motion, will be dismissed for such omission.

St. Lawrence Special Term, February, 1864.

MOTION to set aside all proceedings in this action on the ground that it does not appear in any manner upon the copy of the summons served, that any United States revenue stamp was affixed to the original summons and cancelled, as required by the United States Statute.

MYERS & MAGONE, *for the motion.*

BROWN & BEACH, *in opposition.*

JAMES, J. This was a motion to dismiss the action because there was no revenue stamp upon the summons. In support of his motion, the defendant produced the copy

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of the summons served, and there is nothing on it to indicate that the original had the necessary stamp.

The plaintiff produces the original, which is properly stamped, and makes affidavit that it was properly stamped when issued.

The revenue law requires a fifty cent stamp upon every legal process whereby a suit is commenced, and an omission to affix such stamp renders the process invalid. (*Revenue Law of 1862, §§ 94 and 95.*)

By the Code, civil actions can only be commenced by service of summons (*Code, § 127*); and the service can only be made by delivering a copy of the summons, or by publication (*Code, § 134*). It will thus be seen that the revenue stamp is essential to the validity of the summons, and that service can only be made by delivering a copy, where personal service is had. If the original had a revenue stamp attached, can that be a copy which omits an essential part of such process?

I think the defendant is entitled to some notice that a stamp was attached to the original, either by some indication on the copy served or by showing the stamp on the original. Showing the seal on the original was the manner of serving subpoenas in chancery, which were invalid without having the seal of the court impressed, and although necessary to exhibit the seal, it was also customary to mark the copy delivered as indicating a seal. I am not now prepared to say that showing the stamp on the original process, at the time of service, without marking the copy served, would not be sufficient, but I am satisfied that some indication of a stamp being attached, must be given; and as there was none in this case, the motion must be granted, but without costs.

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NEW YORK SUPERIOR COURT.

THEODORE REIMERS and others agt. JOHN P. RIDNER and others.

A contract in writing was made as follows: "New York, September 28, 1854. Sold to Messrs. Reimers & Schmidt, seven hundred and thirty-three bags crude saltpetre, at fifteen cents per pound, cash, in bond, to arrive on board the ship *Arabella* from Salentta, bound to Boston. No guarantee made as to quality or time of arrival of said ship, to be taken when landed along side of the ship in Boston. (Signed), Babcock & Cox, Brokers."

Held, that this is a mere *executory contract*, conditional on the arrival of the goods, and not a *transfer of title*.

Held, also, that the *purchasers* under this contract were not bound to accept a *less number of bags* of saltpetre than the contract specified.

General Term, February, 1864.

Before ROBERTSON, C. J., MONCRIEF and MONELL, J. J.

This action coming on to be tried before a justice of this court and a jury, the defendants, upon the case being opened, moved to dismiss the complaint. The court overruled the motion, and to its decision in that behalf the counsel for the defendants then and there duly excepted.

After introducing some testimony, the defendants again moved to dismiss the complaint, which motion was denied by the court, and defendants' counsel duly excepted.

The defendants' counsel thereupon requested the court to instruct the jury to find a verdict for the defendants. The court declined so to do, and the defendants' counsel duly excepted.

Thereupon the court directed the jury to find a verdict for the plaintiff for \$4,296.95, and directed "the exceptions taken at the trial to be heard in the first instance at the general term, and judgment in the meantime to be suspended." To this direction the counsel for the defendants duly excepted.

The complaint alleges that the defendants on or about the 25th day of September, 1855, at the city of New

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York, entered into a contract in writing with the plaintiffs, whereby the defendants bargained for and bought of the said plaintiffs, and the said plaintiffs, at the instance and request of the said defendants, then and there "sold to the defendants 733 bags of crude saltpetre at fifteen cents a pound, cash, in bond; that the same was to arrive on board the ship *Arabella* from Calcutta, bound to Boston; no guaranty as to quality or time of arrival of said ship, and the same to be taken when landed from along side the ship in Boston;" that the said ship, with the saltpetre on board, arrived at Boston on or about the 3d day of December, 1855. * * * * That immediately after the said arrival of the said ship, as aforesaid, to wit, on or about the 11th day of December, 1855, the plaintiffs offered and tendered said saltpetre to said defendants, &c. * * * * That the said defendants, at the time aforesaid, when so requested, and at all times thereafter, have neglected and refused to receive said saltpetre or any portion thereof, or to pay for the same, and then and there, and at all times thereafter, have wholly neglected and refused to comply with their undertaking or contract.

The complaint further shows that on or about the 24th day of December, 1855, upon inspection of the said saltpetre, three hundred bags were found to be unsound and unmerchantable, and that thereupon the plaintiffs waived their right to accept the whole amount or number of bags of saltpetre, but tendered and offered to deliver to the defendants the remainder thereof—to wit, three hundred and ninety-three bags thereof—being sound and merchantable * * * and the plaintiffs were then ready, and able and willing so to deliver the said saltpetre; that the defendants at the time aforesaid, and at all other times, have neglected and refused to receive said saltpetre, or any portion thereof, or to pay for the same, and have wholly neglected and refused to comply with their said undertaking or contract.

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The answer of the defendants denies that they bargained for and bought of the plaintiffs, and that the plaintiffs sold to them seven hundred and thirty-three bags of crude saltpetre or any part thereof, but the defendants aver that on or about the 25th day of September, 1855, they (the defendants) entered into a contract with the plaintiffs, of which the following is a copy:

"NEW YORK, September 25th, 1855.

"Sold to Messrs. Reimers & Schmidt, seven hundred and thirty-three bags crude saltpetre, at fifteen cents per pound, cash, in bond, to arrive on board the ship Arabella, from Calcutta, bound to Boston. No guaranty made as to quality or time of arrival of said ship, to be taken when landed along side of the ship in Boston.

"(Signed,)

"BABCOCK & COX, Brokers."

* * * The defendants deny that they ever became the owners of any part of said saltpetre; * * * they aver that the plaintiffs never were the owners, or possessed of other than three hundred and ninety-three bags of saltpetre on board of said ship Arabella, * * * and they deny neglect or refusal to comply with their undertaking or contract.

It seems that an invoice of 1,467 bags of saltpetre was shipped on board the ship Arabella; that this shipment belonged to W. S. Bullard, and was the only saltpetre on board of that vessel; that on the 11th of August, 1855, for account of the said W. S. Bullard, Esq., a broker in Boston "sold to the Hazard Powder Company one-half of an invoice of saltpetre, to arrive per ship Arabella, from Calcutta, say about 733 bags, more or less, invoice 1468 bags,) at eight cents per pound, six months' credit from delivery on the wharf. No guaranty as to quality or time of arrival."

It further appears that on the 12th September, 1855, §

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contract, of which the following is a copy, was duly made by a broker, and confirmed by said Bullard:

" BOSTON, September 12th, 1855.

" Sold on account W. S. Bullard, Esq., one-half of 1464 bags of saltpetre, on board of the ship *Arabella*, to arrive, at ten and one-half cents per pound, cash, in bond, (it being understood that the purchaser is to have one-half of each number in the invoice,) to Messrs. Reimers & Schmidt, of New York.

(Signed,) *F. H. JACKSON, Broker.*

" Confirmed, W. S. BULLARD."

It was admitted that 340 bags of saltpetre to arrive in the *Arabella*, referred to in the complaint, were nearly, or quite, lost or destroyed, and were sold upon their arrival on account of the underwriters (part of the same being entirely dissolved by sea water;) that the same were abandoned by the original importer (W. S. Bullard, Esq.)

The *Arabella* arrived on the 7th December, commenced discharging the saltpetre about the 15th, and finished on the 24th; the one-half of the invoice sold to the plaintiffs was sold to arrive in bond; it was entered in Mr. Bullard's name; it must be entered by the importer; Mr. Bullard held the bills of lading for this saltpetre; he had not assigned the bill of lading, or any part thereof, to Reimers & Schmidt (plaintiffs;) a certificate of transfer issued by the custom house authorities constitutes a delivery of goods in bond from the importer to the purchaser; Mr. Bullard did obtain such a certificate of transfer of these 398 bags sold to the plaintiffs; he obtained this certificate on the 7th January, 1856; it was mailed the same day to the plaintiffs; the plaintiffs or their assigns could not have obtained the 398 bags of saltpetre without the certificate of transfer. The plaintiffs paid for the saltpetre between the 22d December, 1855, and the 2d of January, 1856. The plaintiffs could not deliver the saltpetre, they

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purchased from Mr. Bullard, until the 7th January, 1856. The plaintiffs on the 12th January, 1856, made a formal tender, through their attorney at law, to the defendants and they replied, "we cannot accept it (393 bags of saltpetre,) as the contract calls for different things," or words to that effect.

R. W. VAN PELT, *for plaintiffs.*
JAMES ESCHWEGE, *for defendants.*

By the court, MONCRIEF, J. This action is brought upon a written contract of sale of saltpetre, in plain terms entitling the defendants to receive from the plaintiffs, when landed in Boston along side of the ship *Arabella*, 733 bags crude saltpetre, to arrive on board the said ship; and there is an ample illustration in the bill of exceptions in this case of the peculiarities of mercantile contracts, and the necessity of giving construction to each according to the intent of the contracting parties manifest from their respective contracts. By the sale note from Bullard to the Hazard Powder Company, following the decision in 3544 *Barbour Rep.* 515, 521 (*Havemeyer agt. Cunningham*), the latter was entitled as a purchaser of an invoice of goods then on board the ship *Arabella*, whatever portion of the quantity sold arrived in a sound condition, and they received their one-half part of the invoice so purchased. The plaintiffs' contract calls for "the one-half of 1,464 bags saltpetre;" and hence, in my view, differs most essentially from the agreement to deliver "one half of an invoice of saltpetre to arrive per ship *Arabella*, say about 783 bags, more or less." * * * The one can legally claim 782 bags of saltpetre from on board the vessel *Arabella*, and the other having bought the moiety of whatever is on board and may arrive at the port of destination, of course is entitled to demand what may arrive. The distinction between the sale to the Hazard Powder Company, and the

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cases cited from 35th *Barbour Rep.* (*supra*), is, that in the one there was no guaranty as to quality, and in the other "the sugar was to be of current quality, clayed;" this, however, is immaterial in the present discussion, inasmuch as, in both these instances, the contract of sale must be held to be absolute-in the sense that the party was entitled to the thing he had agreed to buy, being then on board of the vessel. With reference to the contract made with the plaintiffs, it may be questionable whether they were bound to receive under it any greater number of bags than 732 bags, being the one-half of 1,464 bags of saltpetre, on board of the ship *Arabella*, on the 12th September, 1855. If on that day, on board of that ship, there was in existence only 786 bags of saltpetre, it can need no argument to state, as a legal verity, that Mr. Bullard could not, by virtue of the contract, require the plaintiffs to accept 393 bags, being one-half of the saltpetre actually arriving at Boston and delivered from on board the ship *Arabella*, unless their contract is construed to import a sale of one-half the invoiced saltpetre then on board the ship *Arabella*.

It is an elementary principle of law, that, if the right of property has not passed by the bargain, the purchaser cannot be made responsible for the price, unless the vendor can show that the article or chattel tendered for acceptance fairly corresponded in quantity * * with the thing bargained for and agreed to be bought; for no man can be compelled to take more than he agreed to buy. * * (*Addison on Contracts*, 238, p. 237, *top paging*, 2d *American edition*.)

It will not be pretended that, in either *Havemeyer agt. Cunningham* (*supra*), or by virtue of the contract of Bullard with the Hazard Powder Company, the importer or vendor was divested of his property, or that the title to the goods passed to the vendee; the weight of the articles remained to be ascertained. (*Add. on Cont.* 224 and

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5, and cases cited; *Parsons' Mercantile Law*, pp. 48-9.) The evidence fully establishes the fact in the present case that the title to the goods remained in Mr. Bullard until the 7th of January, 1856. He could have assigned and transferred the title to the saltpetre on board the ship *Arabella* by the indorsement and delivery of the bills of lading which he then had, and which he continued to hold until after the arrival of the ship in Boston.

In confirmation of this view, Mr. Bullard abandons the property to the underwriters, and receives value therefor from them, which property otherwise was owned by the plaintiffs or by the defendants.

Again, the transaction between the parties on the 25th of September, 1855, cannot be treated as an absolute sale of seven hundred and thirty-three bags of saltpetre at that time. It does not appear that such a quantity which could be claimed by the plaintiffs under their contract with Bullard was in existence on board the ship *Arabella* on that day. Only three hundred and ninety-three bags arrived at Boston, over which the plaintiffs exercised acts of ownership or control, or became entitled to the possession.

The contract of the plaintiffs with the defendants called for the delivery of 733 bags of saltpetre from on board the ship *Arabella*, to be taken when landed along side the ship in Boston; the plaintiffs could not be required to transfer any greater, and the defendants as plainly cannot be compelled to accept any less number of bags of saltpetre than they had agreed to purchase and the plaintiffs contracted to deliver.

The tender of a number less than 733 bags of saltpetre did not satisfy the requirement of the contract on the part of the plaintiffs, and the defendants were not bound to accept (*Shields et al. agt. Pettie et al.* 4 *Coms. Rep.* 122; *S. C. 2 Sandf. S. C. R. p.* 262) is in striking analogy with the

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agreement between these parties, and is decisive of the question involved.

I am of opinion that the learned judge erred in not directing a verdict for the defendants, and, in my opinion, the refusal to dismiss the complaint upon the plaintiffs resting their case was also erroneous. A verdict of the jury for the plaintiffs upon the evidence then introduced cannot be sustained.

In this view the other exceptions need not be, and are not, noticed.

The exceptions should be sustained, and a new trial directed, with costs to abide the event.

ROBERTSON, J. The sale in this case was of goods to arrive, it was therefore a mere executory contract, conditional on their arrival (*Shields* agt. *Pettie*, 4th *N. Y. Rep.* 122; *S. C. 2 Sandf. R.* 262; *Benedict* agt. *Field*, 16 *N. Y. Rep.* 595; *S. C. 4 Duer Rep.* 154) and not a transfer of title. The only question is, whether the contract was for the delivery of so much of the amount sold as should arrive, and therefore apportionable, or only of the specified amount. In *Havemeyer* agt. *Cunningham* (35 *Barb. Rep.* 515) the contract was of an invoice of goods of a certain number of tons "more or less," and for that reason only it was held that the seller was only bound to deliver what arrived, and was not responsible for any loss on the voyage.

In the present case the contract was for a definite number of bags of saltpetre, although not for a specified quantity. There does not seem to be any good reason why a purchaser of goods at sea, of whose quantity he cannot be presumed to be aware, should be compelled to accept part of the quantity bought by him, any more than if they were in a distant warehouse. The fact that such goods have not arrived merely postpones the execution of the

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contract, and without some qualification in its terms ought not to affect the rights of either party.

In the case last cited, the principal question was, whether the terms "to arrive on or before" a certain day, used in it, made the sale absolute or conditional on the arrival on or before that day, and it was held to be absolute on arrival, whenever it happened, merely postponing the time of delivery, distinguishing it from *Russell agt. Nicoll* (3 *Wend. Rep.* 112,) only by the insertion of the name of the vessel. The obligation of the seller only to deliver what arrived in such case sustains a correlative obligation on the part of the buyer to accept it. But, unless the former obligation had been limited by the use of the words "more or less" and "invoice," the purchaser, by whom the action was brought, could not have been enabled to recover for non-delivery of the cargo actually arrived, if less than the amount specified, as embracing the whole of the contract. All the reasons which, in the case of any other contract, entitle the party seeking to enforce it to reject a partial and require a full performance, equally apply to such a one as this; less than the full amount contracted for may baffle all the purposes of a buyer. His right to insist on a complete performance is established by numerous authorities.

Besides, there was on board, on the arrival of the vessel, the full number of bags of saltpetre required to be delivered by the contract, although nearly one-half had been lessened in bulk by the dissolving of part of the contents by water.

These were transferred to underwriters by the plaintiffs, or those under whom they claim, by abandonment. There was no guaranty of quality in the contract, and the price was to be regulated by weight. I see no reason why the defendants were not entitled to whatever remained of the saltpetre in the bags which were abandoned. It was held in *Havemeyer agt. Cunningham* (*ubi supra*), that the pur-

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chasers were entitled to recover for the part of the cargo alleged to have been injured. They were, at least, entitled to an election. Possibly if such goods were unmerchantable, as charged in the complaint, as the defendants would not be bound to accept them, the plaintiffs were not bound to tender them; but the evidence did not sustain this view.

With regard to the mode of delivery, I therefore concur in the opinion that the defendants are entitled to a new trial, with costs to abide the event.

SUPREME COURT.

WILLIAM S. GILCHRIST and others, heirs at law of CHARLES GILCHRIST, deceased, agt. SILAS COMFORT.

On the trial of an action to recover possession of real estate, the plaintiff introduced in evidence a judgment roll of this court, by which it appeared that in an action in this court against the plaintiff in this action, by which the plaintiff in that action claimed title to the premises, it was adjudged in that action that the title to the premises was legally in the defendant, the plaintiff in this action, whereupon the court considered that the judgment given in evidence was conclusive as between the parties of the plaintiff's right to recover the premises, and gave judgment for the plaintiff, and the defendant moved for a new trial, on exceptions, including this ground, with others, which was denied by the general term, for the reason that the question of title was *res judicata*. And after the decision of the general term, the court of appeals reversed so much of the judgment which was given in evidence in this action, as determined *any question of title between the parties*.

Held, that the defendant in this action was entitled to his motion to set aside the order denying the motion for a new trial, together with the judgment which had been entered; also, allowing a re-argument of the remaining points contained in his exceptions.

Broome General Term, January, 1864.

Before CAMPBELL, PARKER and MASON, Justices.

MOTION by defendant to set aside a former order of this court denying a motion for a new trial.

J. E. DEWEY, *for motion.*

D. C. BATES, *opposed.*

Gilchrist agt. Comfort.

By the court, PARKER, J. This action was brought by Charles Gilchrist against Silas Comfort, the defendant, to recover possession of certain real estate in Otsego county. Since the action was commenced Charles Gilchrist has died, and the above named plaintiffs, his heirs at law, have been duly substituted in his stead. On the trial at the circuit the plaintiff introduced in evidence a judgment roll in an action in which the First Methodist Episcopal Church in Springfield (under whom the present defendant holds the premises in question) was plaintiff, and the said Charles Gilchrist defendant; which action was brought to set aside the deed under which the said Gilchrist claimed the premises, as a cloud upon the title of the said plaintiff, and also to obtain an adjudication establishing the title of the plaintiff as against the defendant.

The judgment obtained in that action not only dismissed the complaint, but adjudged the right to the premises to be in the then defendant. On the trial of this action at the circuit a verdict was directed for the plaintiff. A motion was subsequently made at general term by the defendant upon exceptions for a new trial, which was denied expressly on the ground that the said judgment so given in evidence was conclusive, as between the parties, of the plaintiff's right to recover the premises. Since that decision of the general term, the court of appeals has reversed so much of the judgment in the First Methodist Episcopal Church in Springfield against Gilchrist as determines any question of title between the parties, and affirms it only so far as it dismisses the complaint, on the ground that the deed which the action was brought to set aside, as a cloud on the title of that plaintiff, was void on its face, and therefore no cloud on the plaintiff's title.

The defendant now moves for an order setting aside the former order of this court denying the motion for a new trial, together with the judgment, which has been entered in the action, also allowing a re-argument of the motion

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for a new trial, upon the exceptions taken by him on the trial, striking out of the case, on which the same shall be so re-argued, the said judgment roll and all matters relating thereto.

If the judgment in the court of appeals reversing so much of the judgment put in evidence on the trial as determined the rights of the parties in respect to the land in question, had been given before the trial, the roll would not have been competent, much less conclusive evidence in this case, and the decision made at general term, holding the defendant concluded by it, would not have been made.

The question now is, whether the defendant can have any advantage of that decision in the present condition of the action. Although a judgment has been entered upon the verdict, it remains unexecuted, as no execution has been issued upon it, so that the court has it still within its control.

Upon principle it would seem that relief ought to be granted to the defendant. This court denied his motion for a new trial upon a ground which the court of appeals has since done away—one which, while it existed, was indeed a valid ground for denying the motion, but which, it turns out, ought never to have had existence; and inasmuch as this court has made such a ground the test of the rights of the parties, it ought, if not inconsistent with positive rule, to place them in *status quo*, and decide in regard to those rights, without reference to this false ground on which its former decision was based. I think it within the power of the court, and consistent with its established practice, to grant relief in this case.

The principle seems to be well settled that "where there are several dependent judgments, and the principal one is reversed, the others cannot be supported; as if a man recover in debt upon a judgment, if the first judg-

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ment be reversed, the second falls to the ground." (2 *Tidd's Practice*, 1128; *Bac. Abr. title Error*, M. 8.)

In accordance with this principle it was held in *Lazell* agt. *Miller* (15 Mass. R. 207), that "if a judgment be recovered, based on a former judgment, and collected, which former judgment has since been reversed, the amount may be recovered back in an action for money had and received." A judgment in an action brought upon a former judgment which was erroneous cannot be reversed for the error in the former judgment; the course to be taken is to obtain a reversal of the original judgment, and then apply for a review of the action brought upon the first judgment. (*Hawes* agt. *Hathaway*, 14 Mass. R. 293.) It was held in *Wetmore* agt. *Law* (34 Barb. 515) that when facts have arisen since a judgment was entered of such a nature that it is clear the judgment ought not to be executed, relief against the judgment may be given upon a motion to vacate the same. And in *The People* agt. *The Mayor, &c. of New York* (11 Abbott, 66) it was held that "if a judgment is based upon the fact that a former judgment is conclusive upon the parties, it should be set aside on motion, when the former judgment has been set aside."

As this court held the question of title to the premises *res adjudicata* as between the parties, made so by the adjudication in *The First Methodist Episcopal Church in Springfield* agt. *Gilchrist*, and upon that ground alone denied a new trial, and as the adjudication on which this court based its decision, has since been reversed, the case comes within the principle of the cases cited. The ground of the order denying a new trial has been removed, and the order itself should therefore be vacated, and the parties put in *status quo*. I am of the opinion that the judgment and order denying a new trial should be set aside, and a re-argument allowed upon the remaining points in the case. This will be but putting the parties where they were before the argument of the motion for a new trial.

Budd agt. Jackson.

And in order to effect the object of the re-argument—to examine the question of defendant's right to a new trial upon the remaining points in his case, exclusive of the one which the court of appeals has removed—it is necessary that the case should come before the court in a shape presenting those remaining points alone. To this end the defendant's counsel asks that the judgment roll, and all matters appertaining thereto, be stricken from the bill of exceptions. We do this in effect, by ordering the re-argument upon the remaining points, exclusive of that. Under such an order the judgment roll and the matters pertaining to it become of no importance to the case; are entirely nugatory; and inasmuch as the records of the court should not be loaded with immaterial and impertinent matters, I think the better course is to strike them out.

I am of opinion that the motion of the defendant should be granted.

SUPREME COURT.

GILBERT BUDD agt. FRANCIS J. JACKSON.

When the plaintiff unites in the same action, a claim which is not disputed with one that is, the defendant, under section 385 of the Code, may remove from the controversy the undisputed claim, by the *offer* provided for under this section, and thus make the *subsequent costs* depend upon the result of the litigation in regard to the *disputed claim*. But the offer must be fully equal to the sum actually and really due to the plaintiff, or he is not bound to accept it.

The "more favorable judgment" mentioned in section 385, which the plaintiff must recover to entitle him to costs, does not mean, in the case of a money demand upon which interest is accruing, a sum greater at the time of the report or verdict than the sum offered. If the verdict or report is made up of principal and the interest which accrued thereon, in determining which is most favorable to the plaintiff, the *interest which accrued intermediate the time of the offer and the time of the rendition of the judgment, is to be rejected therefrom*.

Thus, in this case, the sum named in the written offer was \$357.44, and the sum found due the plaintiff by the referee was \$377.17, being \$19.73 in excess of the sum expressed in the offer, but as this excess was not equal to the *interest from the time of the offer to the date of the report*, the plaintiff failed to obtain a more favorable judgment.

Budd agt. Jackson.

Kings General Term, December, 1863.

BROWN, SCRUGHAM and LOTT, Justices.

APPEAL from an order made at special term-denying defendant's motion for costs.

J. H. JACKSON, for the plaintiff.

H. A. NELSON, for the defendant.

By the court, **BROWN**, Justice. On the 27th of June, 1862, the defendant served upon the plaintiff, with his answer, an offer in writing, pursuant to section 385 of the Code, to allow judgment to be entered against him for the sum of \$357.44, with the costs of the action, which the plaintiff declined to accept. The action was afterwards referred to a referee to hear and determine who made his report in writing bearing date March 27th, 1863, and in which he found, first, that the defendant owed nothing to the plaintiff upon the note first set out in the complaint; second, that the defendant was indebted to the plaintiff upon the note secondly mentioned in the complaint, \$400 for principal, with the interest thereon from May 4th, 1862; third, that the plaintiff was indebted to the defendant at the time of the commencement of the action in the sum of \$48 for board. And as a conclusion of law he found that there was due and owing to the plaintiff at the date of his report the sum of \$377.17. It results from this statement of the indebtedness that there was actually due to the plaintiff at the time of the defendant's offer that judgment be taken against him (27th June, 1862) the sum of \$356.14, and no more. The provision of the Code referred to is in these words: "The defendant may at any time before trial or verdict serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accept the offer and give notice thereof in writing, within ten days, he may file the

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summons, complaint and offer with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance be not given, the offer is to be deemed withdrawn, and cannot be given in evidence, and if the plaintiff fail to obtain a more favorable judgment he cannot recover costs, but must pay the defendant's costs from the time of the offer." The purpose of this section is to prevent unnecessary litigation.

When the plaintiff unites in the same action as he did in the present case, a claim that is not disputed with one that is, the defendant may remove from the controversy the undisputed claim by the offer under the section quoted, and thus make the subsequent costs of the litigation depend upon the result of the litigation in regard to the disputed claim. The offer must be fully equal to the sum actually and really due to the plaintiff, or he is not bound to accept it, and whether it is equal to that or not is to be determined (if it is not accepted) by the sum subsequently found due by the verdict of the jury, or the report of the referee. The plaintiff is at liberty to reject the offer, and to proceed in the action as if it had not been made, but he does this at the peril of losing his own subsequent costs, and also of paying costs to the defendants, should he fail to recover a more favorable judgment. This "more favorable judgment," spoken of in the section which he must recover to entitle him to costs, does not mean in the case of a money demand, upon which interest is accruing, a sum greater at the time of the report or verdict than the sum offered. Because the excess may be made up of the interest accruing since the time of the offer and pending the litigation. Were this construction to obtain the section would become practically useless, for, as it would be impossible to know how long the litigation has to last, so it would be impossible to know what sum to offer. Besides, if the offer be a greater sum than that

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actually due at the time of the offer, by accepting it the plaintiff would in fact get what did not belong to him. The time of the offer is a material element in determining whether it is as favorable as the judgment recovered. And if the verdict is made up of principal and the interest which accrued upon that principal, in determining which is most favorable to the plaintiff, the interest which accrued intermediate the time of the offer and the time of the rendition of the judgment is to be rejected therefrom. Thus, in the present case, the sum named in the written offer was \$357.44, the sum found due the plaintiff by the referee is \$377.17, being \$19.73 in excess of the sum expressed in the offer, but as this excess is not equal to the interest from the time of the offer to the date of the report, the plaintiff has failed to obtain a more favorable judgment.

The test is the sum due to the plaintiff for principal and interest thereon at the time of the written offer, and not that sum increased and enlarged with the interest intermediate the date of the offer and the date of the report or verdict. (*Schneider agt. Jacobi*, 1 *Duer*, 694; *Burnett agt. Westfall*, 15 *Howard's Pr. Rep.* 420.)

We think the judge at the special term erred in denying the defendant's motion for costs subsequent to the time of the offer. The order appealed from should be reversed, and an order entered granting the defendant's motion for costs with \$10 costs of the appeal and \$10 costs of the motion at the special term.

Matter of Neally.

SUPREME COURT.

Matter of NEALLY, a lunatic.

A guardian or committee of a lunatic appointed under and in pursuance of the laws of another state, where the lunatic and guardian reside, cannot be recognized by our courts, on an application by the guardian for property belonging to the lunatic in this state.

Foreign executors and administrators may apply here for, and receive, letters testamentary and of administration; but our laws have never extended such a privilege to a foreign guardian or committee of a lunatic. Such an appointment can only be made under proceedings instituted in this state to ascertain the fact of lunacy.

Erie Special Term, January, 1864.

W. A. MALOY, for petitioner.

DANIELS, Justice. A motion was made at the special term held in Erie county in January, 1864, on behalf of Lyman Cook as guardian of James Neally, a lunatic, for an order directing the payment to him of certain moneys to which the lunatic had become entitled under the will of his father. Both the lunatic and the guardian reside in the state of Iowa, where the appointment was made in proceedings instituted in the county court of Des Moines county.

The father of the lunatic died in the county of Cattaraugus, in this state, and the executor of his estate was appointed and resides there. As guardian the applicant derives his authority from the laws of the state in which his appointment was made, and by force of those laws became entitled to the lunatic's property only so far as it was in that state. In the absence of statutory authority other states will not recognize the artificial character thus created, (*Doolittle agt. Lewis, 7 John. Chy. R. 45; Story on the Conflict of Laws, 424.*) While the laws of this state empower foreign executors and administrators to apply for, and receive, letters testamentary and of administration,

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no such privilege has been extended to the foreign guardian or committee of an insane person. The appointment can only be made under proceedings instituted in this state to ascertain the fact of lunacy. (*Matter of Payn*, 8 *How.* 220.) Even then it is very doubtful whether the foreign guardian or committee could be appointed. For the statute contemplates the residence of the committee to be within the reach of the process of the courts of this state in order to secure the performance of his duties and enforce his obligations to account, (3 *R. S.* 5th ed. 135, §§ 8, 9, 10; 136, § 15), which could hardly be done in the case of a non-resident committee.

That the lunatic is a resident of another state is no objection to the issuing and execution of a commission of lunacy. For then it will be executed where it can be done most conveniently for all parties concerned. (2 *Paige*, 174; 2 *John. Chy.* 124.) And the proceedings and determination of the county court in Iowa judicially ascertaining the fact of lunacy, would be sufficient evidence to secure the same result under a commission issued in this state. (*Gillemo's case*, 2 *Vesey*, 587; *in the matter of Daniel Perkins*, 2 *John. Ch'y* 124.)

But the rule is not entirely dependent upon those authorities. Under the constitution and laws of the United States, when properly attested, these proceedings are to have the same faith and credit in the courts of other states as they have by law or usage in the courts of the state from whence the records or proceedings are taken. (*U. S. Const. art. 4, § 1*; *U. S. Stat. at Large*, vol. 1, 122.) And insanity when once established is presumed to continue until the contrary is made to appear.

The motion must be denied.

McDonald agt. Lord.

NEW YORK SUPERIOR COURT.

JOHN McDONALD agt. SAMUEL LORD and others.

A contract made for the employment of an agent or clerk, at a specified salary for one year, is an entire contract, and cannot be lawfully terminated within the year without justifiable cause.

An agent must faithfully serve his principal. He is bound, to the exercise of all his skill, ability and industry in favor of his principal. As an agent to *sell*, it is his duty to get the highest fair price; and this duty is wholly incompatible with his *wish to buy* from his principal.

No agent or trustee can deal with the subject matter of his trust, except for the benefit of his principal. Any act by an agent in respect to the subject matter of the agency, injurious to the principal, may be avoided by the principal; and where an agent to *sell* becomes the *purchaser*, the court will presume that the transaction was injurious, and will not permit the agent to contradict the presumption.

Consequently, where a clerk was employed for one year at a stipulated salary as salesman in a carpet store, and during the year his principal ascertained that he had an interest in another carpet store, to which he sold carpets of his principal, although no unfairness or fraud was shown in making such sales:

Held, that the clerk virtually became the *purchaser* of the goods he sold, and his interest in the purchases was incompatible with the interests of his principal, and justified the principal in discharging him from his service.

New York General Term, February, 1864.

Before ROBERTSON, Ch. J., MONCRIEF and MORSE, Justices.

THE plaintiff's assignor (John C. Boak) was employed by the defendants as manager of their carpet department in their store in this city, at a salary of \$1,400, for one year from the 9th of January, 1860. On the 7th of July, 1860, Boak was discharged by the defendants from their service. Boak obtained other employment at a less salary, and the action was brought to recover the difference, for the unexpired part of the year, between the salary agreed to be paid by the defendants and that which Boak obtained elsewhere after his discharge. Boak testified that one of the defendants told him that he (Boak) had an interest in another carpet house in this city, and, if such was the case, he could no longer continue with them. He further testified: I did not tell Mr. Lord that I was inter-

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ested in the firm of Beattys & Co.; I declined to tell Mr. Lord that I was; he asked me the question, and I declined to answer; I told him I considered it would make no difference to Lord & Taylor—that it was my business what investments I made with my funds; I became interested in the firm of Beattys & Co. on January 1st, 1859; the firm of Beattys & Boak commenced on the 13th of January, 1862, in the carpet business, at No. 8 Fourth avenue; they kept a store there in 1860; the way I was interested there was, I had money there; I had money invested in the house; any definite amount I could not state that I was to receive for my interest; it was dependent upon the profits; I told Mr. Lord I considered it exclusively my business; I think Mr. Lord told me they could not have any one in their establishment who was interested in any other house; he told me, if I was so interested elsewhere, I could no longer remain with Lord & Taylor; I sold Beattys carpets; I never received any instructions from the cashier to sell nothing further to Beattys in the month of May, 1860; I was told some time in the month of May or June, 1860, to sell no more goods to Benjamin Beattys on credit; that was the only instruction I ever received in the matter; I think Mr. Wilson showed me a letter written by John T. Lord in the Broadway house, instructing him to see that no more goods were sold to Benjamin Beattys on credit; Wilson had not, previous to that, directed me not to sell to Beattys; I had not refused to obey his directions; this note was not, to my knowledge, sent from John T. Lord, in consequence of my refusal.

Q. And didn't you, after getting this direction in May or June, continue to sell to Beattys? Didn't you direct the entry clerk to make entries to Beattys?

A. I have stated I sold goods to Beattys after seeing that letter of Lord's; it was after that that Lord came over and had this conversation, and asked me if I was so interested; Lord, when he discharged me, said he under-

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stood I was interested in the concern of Beattys; I told him that I did not hold myself responsible for current reports; he wanted an explicit answer whether I was interested in it or not; I told him I considered it exclusively my own business what use I made of money or any moneys I might have; either before or after my using that expression, he said that I could not be interested elsewhere and remain with the concern of Lord & Taylor; I had no reply to make to that; I went with the house of Barnum, Sutton & Co. on the 16th of July, 1860.

He further testified that he did not spend any of his time at the store of Beattys & Boak, and that it did not in any way interfere with the discharge of his duties with the defendants; that he never purchased goods for Beattys & Boak, and that he sold the goods of defendants to them as he sold to any one else.

The defendants proved that the entry clerk was instructed by them not to enter sales to Beattys on credit, and that Boak was so informed, and that Boak told the entry clerk to enter any goods on time to a certain amount and he would be responsible.

The justice dismissed the complaint, and from the judgment of dismissal the plaintiff appealed.

JOHN HEWITT, *for appellant.*

W. R. STAFFORD, *for respondent.*

By the court, MONELL, J. If the defendants dismissed Boak from their service because of any disobedience of their lawful orders, I think there was sufficient conflict in the evidence on that subject to have required the case to have gone to the jury. Boak was directed not to sell any more goods to Beattys & Boak on credit, and it was in evidence, although contradicted by Boak, that after such direction he continued to make sales to that firm. This disputed evidence would have been proper to go to the

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jury, and it would have been error to have taken the question from them.

But there is another ground upon which it is proper to assume the learned justice put his decision.

The contract was an entire one, and the defendants could not lawfully terminate it within the year, without justifiable cause.

The evidence shows, that Boak, at the time of and during all of his employment by the defendants, to the time of his discharge, as the manager of their carpet department, was interested as a partner in the carpet house of Beattys & Boak, No. 8 Fourth avenue, and that he sold the goods of the defendants to the firm in which he was interested. The fact of this connection of their employee with the firm of Beattys & Boak did not come to the defendants' knowledge until shortly before his discharge, and the only ground assigned for the discharge was such connection and interest, and the sales by him of the defendants' property substantially to himself.

It is a well settled principle of morals as well as of law, that the agent must faithfully serve his principal. However unquestioned may be the honesty of the agent, or his impartiality between his own interests and those of his principal, he is bound to the exercise of all his skill, ability and industry in favor of his principal. As an agent to sell, it is his duty to get the highest fair price; and this duty is wholly incompatible with his wish to buy. In every trust this principle prevails. No agent or trustee can deal with the subject matter of his trust, except for the benefit of his principal. Executors and administrators are expressly forbidden by statute (2 R. S. 104, § 27) from purchasing the property of their testator or intestate; and the rule in equity is, that any act by an agent in respect to the subject matter of the agency, injurious to the principal, may be avoided by the principal, and where an agent to sell becomes the purchaser, the court will pre-

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sume that the transaction was injurious, and will not permit the agent to contradict the presumption. (*Coles agt. Thecothick*, 9 Ves. 234, 247.) The policy of this rule is obvious. The confidence reposed in the agent must not be abused. His position of trust must not be employed to his own advantage, or to the injury of his principal. In short, while in the employment of his principal, his principal's interest must be his interest, and he may have no interest which, conflicting with those of his principal, can work injury to the latter.

Boak was the agent of the defendants to sell their property, and could not become the purchaser without violating the duty which the trust imposed upon him. He did virtually become the purchaser of the goods he sold, and his interest in the purchase was incompatible with the defendants' interests. It is not necessary to draw fine distinctions. There is no evidence in the case of positive unfairness or fraud on the part of Boak in making sales to Beattys & Co. There is no imputation upon his character, nor suspicion, that he made more favorable sales to the firm, in which he was interested, than to others. It is enough that the law presumes such sales to be injurious to the principal, and the plaintiff is not permitted to rebut the presumption. (*Dobson agt. Racey*, 3 Sandf. Ch. R. 60; *S. C. 8 N. Y. R. 216.*)

Upon principles so obvious and just, the facts of this case, in my judgment, afforded the defendants a full and complete justification for rescinding their contract with Boak, and discharging him from their service.

The learned justice was, therefore, correct in dismissing the complaint.

I am of opinion the judgment should be affirmed.

Mantles agt. Myle.

SUPREME COURT.

HARRIET C. MANTLES, appellant, agt. JOHN MYLE, respondent.

The statute requiring a referee to make his report *in sixty days* after the cause is submitted to him, &c., contemplates that some step shall be taken in the cause *after the expiration of the sixty days*, indicating an intention to disaffirm the right of the referee to make and deliver his report.

Where neither party take any such action, until the referee has *made and delivered his report*, they waive their right to proceed in the action as if no reference had been ordered. (This agrees with the cases of *Livingston agt. Gidley*, 26 How. P. R. 1; and *Foster agt. Bryan*, ante 164.)

Erie General Term, February, 1864.

DAVIS, P. J., GROVER, MARVIN and DANIELS, *Justices.*

APPEAL from an order made at the Erie special term denying a motion made by the plaintiff to set aside the report of a referee made after the expiration of sixty days from the final submission of the cause. The cause was tried and submitted after the amendment of 1863 went into effect.

GEORGE W. HOUGHTON, *for the motion.*

J. L. TALCOTT, *opposed.*

By the court, DANIELS, Justice. When this action was finally submitted to the referee the law required him to make and deliver his report within sixty days thereafter, unless otherwise ordered by the court, or stipulated by the parties. If he failed to do so the parties were at liberty to proceed with the action as if no reference had been ordered. (4 R. S. 5th ed. 688, 689.) Neither party took any action evincing a design to avail himself of the right thus secured until after the referee made and delivered his report. The other party, under such circumstances, could well suppose that his opponent did not intend to subject the case to the embarrassment, or himself to the expense,

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of another trial, preferring to leave the referee at liberty to dispose of the action upon the trial already had, than to enter upon another with the possibility of only a like result. It would be unjust to allow one party to mislead another to his prejudice, as he would when, relying upon an implied assent of this character, he receives the report of the referee and proceeds to enter judgment upon it.

The statute contemplates that some step shall be taken in the cause after the expiration of the sixty days indicating an intention to disaffirm the right of the referee to make and deliver his report. It was enacted for the benefit of the parties, conferring the power to proceed with the action upon either electing to do so. But like other statutory provisions made for the benefit of a party, it may be waived where the waiver is not against public policy. (*Tombs agt. Rochester & Syracuse Railroad Co.* 18 *Barb.* 583; *Buel agt. Trustees of Lockport*, 3 *Com.* 197.) No conflict of that nature exists to prevent a waiver in this case. This construction of the statute is entirely consonant to the settled practice of the court in other cases of irregularity.

It requires the party to act promptly to avail himself of an advantage offered him in that manner. 1 *Burrill's Pr.* 474, and cases cited.) The same principle has been already applied to the construction of this statute. (*Livingston agt. Gidney*, 25 *How.* 1; *Foster agt. Bryan*, 26 *How.* 164.)

The order appealed from must be affirmed.

McIntyre agt. Borst.

NEW YORK COMMON PLEAS.

McINTYRE agt. BORST.

Where a *surety* signs an undertaking in an action of *claim and delivery of personal property*, and his sufficiency as bail is excepted to, and he fails to justify, and after the period allowed for the justification has elapsed, and after another surety has been substituted, the plaintiff's attorney *countermands the exception*, the first surety, notwithstanding the countermand, is not liable.

New York General Term, February, 1864.

DALY, BRADY and HILTON, judges.

APPEAL from a judgment against the defendant as surety.

By the court, BRADY, J. The defendant Borst signed an undertaking in an action of claim and delivery on behalf of the plaintiff in the action. His sufficiency was excepted to. He was examined and rejected, but the plaintiff's attorney, after the period allowed for the justification had elapsed, and after another surety had been substituted, countermanded the exception. The question which arises upon these facts is, whether this defendant is liable upon that undertaking. The rule is well settled that if bail do not justify within the time allowed by the rules of the court, they cease to be bail, and the plaintiff cannot hold them by giving notice that he waives the exception. (*Flack agt. Eager et al.*, 4 Johns. 185; *The People agt. Judges of Onondaga*, 1 Cowen, 54; *Thorp agt. Faulkner*, 2 Cowen, 514; *Lawrence agt. Graham*, 9 Wend. 477.) It is otherwise if the notice of waiver be served before the period for justification has expired. (*The People agt. Superior Court, New York*, 20 Wend. 607.)

In *Van Dyne agt. Coope*, (1 Hill, 557), it was decided, however, that this doctrine did not apply to the sureties on a replevin bond under the statute. No cases are cited

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in support of this distinction, and no reasons are assigned why it should exist. Justice COWEN says that an exception entered on a replevin bond followed by the mere neglect of the sureties to justify will not work their discharge. This conclusion seems to have been influenced by the condition of the bond, a strict compliance with which was required, unless prevented by the default of the obligee or a release, &c. It is true, that the form of the undertaking and the obligation of the surety are different in actions of claim and delivery to those in cases of arrest, but the right to except is the same. The qualifications of the sureties are required to be the same, and their allowance is governed by the same rules. I think there should be no distinction as to the effect of an exception not waived within the time allowed for justification between the cases mentioned.

The party having the right to do so declares in the form prescribed that he will not accept the surety offered, and should be bound by his election. This is a natural and just view of the act of excepting. The surety feels that, having been rejected, he is no longer bound and may not look for his indemnity to his principal, which he might otherwise do. And this feeling is one prompted by common sense, and should be the expression of the common law. But if this view be incorrect, it seems to me that there can be no doubt that the judicial determination that the surety was insufficient and the substitution of other bail operates as an exoneration.

In *Van Dyne agt. Cope*, Justice COWEN says "it is not necessary to say what effect the complete substitution of new bail may have in replevin as a consequence of the exception," but I think it has such an effect as stated. The substituted surety is necessarily a result of the judicial act, and he assumes the obligations which his predecessor was declared unqualified to discharge. He may be regarded in other words as having taken his place on the

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record by order of the court. For these reasons I think the judgment of the court below should be reversed.

DALY, F. J. I concur upon the ground that there was a substitution of new bail, after exception, and a failure to justify.

SUPREME COURT.

THOMAS HITT, respondent, agt. LEVI CROSBY, and others, appellants.

The residence of a person, for the purposes of taxation, is where he exercises his political rights, such as voting for public officers, and discharges his political duties, such as paying taxes for the support of the government.

And where a person being a single man and having no family, produces evidence tending to show that his residence was in a particular town in another state, during a certain year, it is competent in order to counteract such evidence to show that, during such year he did not vote or pay taxes in such town, and that the conduct on his part and the circumstances of his business relations tended to fix his residence in a town in this state where he was assessed and taxed.

Under the act of 1865, (*Laure 1865, p. 44*), non-residents of this state, who are pedlers of goods in this state, are liable to taxation upon the money invested in their business in each town in which they peddle their goods. And if they are actually assessed in more than one town, their remedy is by swearing off the assessments.

Fourth District, General Term, January, 1864.

This was an action of trespass brought before a justice of the peace to recover the amount of a tax paid by the plaintiff.

The defendants were assessors of the town of Granville in the county of Washington, and the complaint alleged that they assessed the plaintiff without jurisdiction of his person or property.

The answer alleged that the plaintiff was a resident of said town and liable to be assessed therein. (*See Mygatt agt. Washburn, 15 N. Y. R. 316.*)

The jury found a verdict for the defendants, and on ap-

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peal the county court reversed the judgment. The defendants now appeal from the judgment of the county court.

O. F. THOMPSON and A. S. BURDICK, *for the appellants.*
TIMOTHY CRONIN and JAMES GIBSON, *for the respondent.*

By the court, ROSEKRAMS, J. The justice's return states that it contains all the evidence given on the trial. Assuming this to be the case, the justice should have non-suited the plaintiff, and the jury correctly rendered a verdict for the defendants.

It was not shown that the defendants had done more than enter the plaintiff's name on the assessment roll. The complaint alleged that the assessment against the plaintiff was collected by a warrant issued by the defendants against the plaintiff's property. There was no evidence that the defendants ever issued such warrant, and there is no law which authorizes town assessors to issue warrants to collect assessments. When the plaintiff rested the case the defendants moved for a non-suit on the ground that no cause of action was established by the evidence, and because the complaint was unsupported and unproved.

This was sufficient to require of the county court an affirmance of the judgment, notwithstanding errors may have been committed by the justice in the admission or rejection of evidence, none of these errors related to the question whether the plaintiff had given sufficient evidence to sustain his complaint.

But aside from this, I do not think the justice or the jury committed any error for which the judgment should have been reversed by the county court. The plaintiff testified on his own behalf that in 1855 he was a resident of Pawlett, Vermont; made it his home there; was not married, and had no family; had no home anywhere else; and in 1855 had no place of living in Granville; he sup-

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posed he was a voter in Pawlett in 1855; his horse, goods and property were there half the time, and a good share of his property was there all the time; he was sick, and went there to stay; he was sick there three or four weeks. This proof in all its parts was given for the purpose of showing that plaintiff at the time he was assessed by the defendants in 1855 was a resident of Pawlett, Vermont. It was competent for the defendants to counteract these facts, or the conclusion sought to be drawn from them by any proof legitimately bearing upon the question. Accordingly they proved by plaintiff on his cross-examination that although he claimed to be a voter in Pawlett in 1855, he did not vote there in that year, but that he voted in 1855 and 1856 in Rutland and Wallingford, Vermont, and for state officers in 1855. That he did not pay taxes in Pawlett in 1855. That he was a pedler of dry goods in 1855, and in that year peddled in Granville; that he bought hides in 1855 in Granville to the amount of \$500 to \$800, and took them in at a place he selected there; had bought hides there every year up to 1856; he kept a safe there in which he kept his papers in 1855; he received and mailed his letters mostly at the Granville post-office; he had his washing done mostly at Granville; he came to Granville once a month in his business, and would spend two or three days on an average getting through the town; between 1851 and 1855 he stayed in Granville in fifty different places; for twenty years before 1855 he bought skins in Granville; in 1854, when he went to Blossom's, in Pawlett, he stayed one night; he stayed at Blossom's two or three days at a time; he purchased no hides of any amount in any town save Granville.

Subsequently the plaintiff testified that he did not vote in 1855; he testified that in the spring of 1853 or 1854, he went into Blossom's house as he was passing and asked Blossom what he would board him for a week, and told Blossom he wanted a house; Blossom didn't remember the

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remark that plaintiff testified to "that he wanted a house." Blossom said that plaintiff asked him how much he would ask to keep him and his horse per week, and plaintiff go and come when he pleased, but that no time was mentioned that plaintiff wished to continue.

I think the jury were justified in finding from this evidence that plaintiff was a resident of Granville in 1855. He transacted the principal part of his business there, received and mailed his letters there, kept his papers in a safe there, boarded there a considerable portion of his time, and had the most of his washing done there. Aside from the secret intent of the plaintiff, these acts would furnish strong evidence that the plaintiff's residence was at Granville, he being a single man and having no family. The jury was justified in disregarding the plaintiff's testimony as to his intent. Blossom did not agree with plaintiff as to the remark that he wanted a house, and the plaintiff has contradicted himself on the subject of voting in 1855.

The evidence that plaintiff did not pay taxes in Pawlett was objected to, and the objection was properly overruled. A man's residence is where he exercises his political rights, such as voting for public officers, and discharges his political duties, such as paying taxes for the support of the government. The plaintiff had sworn to his secret purpose or intent to regard Pawlett as his residence in 1855, and that he was a voter there in that year.

The defendants proved that he did not vote in Pawlett in 1855. This showed that he did not exercise his political right there, and the evidence offered that he did not pay taxes there in 1855 showed that he did not perform his political duty there. Clearly the conduct of a man is competent evidence upon the subject of residence. This was decided in the case of *Richmond agt. Vassalborough*, (5 *Greenl. R.* 396), and was approved in the case of *Croxford agt. Wilson*, (4 *Barb. R.* 522, 523).

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But if it be assumed that the plaintiff was a resident of Pawlett, Vermont, I think the verdict was right. The act 1855 (p. 44) provides that "all persons doing business in this state as merchants, bankers or *otherwise*, and not residents of this state, shall be assessed and taxed on all sums invested in *any manner* in said business, the same as if they were residents of the state." The plaintiff upon this assumption was a non-resident of this state, and was doing business as a merchant or otherwise. He was a pedler in this state and engaged in that business, and in buying hides and skins in Granville, and had been for thirty years. He says he "had occasion to be in Granville in 1855 in his business of peddling, buying and selling goods, hides and calf skins; that he had peddled in Granville for nearly 20 years before 1855." He had money invested in this business in *some manner*, and the law says he shall be assessed on all sums invested "*in any manner* in his business." The expression "money invested in business" means nothing more than money laid out or put into business with the purpose that it shall return a profit. A pedler's money is just as much invested in his horse and carriage and stock of goods as a regular merchant's money is invested in his store and store house and stock of goods.

The non-residents of this state, who are to be taxed under the act of 1855, are to be taxed "the same as if they were residents." Clearly if the plaintiff was a resident of Granville peddling, buying and selling goods, skins and hides, he would be subject to taxation on the money invested in such business. It is said that the plaintiff peddled goods and bought skins and hides in 50 other towns besides Granville; to the extent that he so traded he interfered with the established traders settled in those towns and enjoyed the protection of the government over himself and his property, and should be taxed in each for the money invested in each town in his business. If by mistake he should be assessed in all the 50 towns for the same

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investment in whole or in part the law affords him a remedy for this error of judgment on the part of the assessors by allowing him to appear before them and swear off his tax.

It is objected that the justice erred in allowing the defendants to prove that they came to the conclusion that plaintiff was liable to be taxed. The answer to this is that the plaintiff had previously given the same evidence by introducing the assessment roll, signed by the defendants as assessors, with the plaintiff's name upon it. Besides the law presumed the fact proved without any evidence.

I think that justice was done by the jury, that the reversal of the judgment of the justice was erroneous, and that the judgment of the county court should be reversed, and that of the justice affirmed with (double) costs.

BOCKES, J., dissented.

A motion made for leave to go to the court of appeals was denied.

BOCKES, J., dissenting.

NEW YORK SUPERIOR COURT.

HORATIO R. WILCOX and JOSHUA DRAPER, respondents, agt. URIAH M. LEE, CHARLES P. H. RIPLEY and CHARLES M. HOYT, appellants.

In an action upon a money demand, where the defendants set up a *judgment* in their favor rendered by a court of concurrent jurisdiction for the *same cause of action*, as a bar, it is competent to go behind the record of that judgment and show by proof *aliunde*, that it was not given upon the *merits*, but on the ground that the action was *prematurely brought*, and therefore not a bar to the present action.

New York General Term, March, 1864.

Before Bosworth, Ch. J., WHITE and MONELL, Justices.

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Motion by defendants for a new trial, on exceptions taken at the trial, and there ordered to be heard at general term in the first instance.

The action is for goods sold and delivered in March, 1861, to a firm composed of the defendants and one George A. Dunlap, at the agreed price of \$450, on eight months credit. The defendants, Ripley and Hoyt, set up a former trial in the marine court, in July, 1861, for the same cause of action, in a suit by thesee plaintiffs against these defendants and said Dunlap, and allege, in their answer, that "judgment therein was rendered in favor of the defendants, on a question of fact, on the 24th of July, 1861." The sale and delivery of the goods in March, 1861, to the defendants at the agreed price of \$450, on a credit of eight months, were fully proved on the present trial. The defendants then proved that in July, 1861, these plaintiffs sued these defendants, and Dunlap in the marine court, and in their complaint claimed to recover for goods sold and delivered to such defendants in March, 1861, at the agreed price of \$450. The complaint in that action did not state whether the goods were or were not sold on a credit, but it alleged that the \$450 was due, with interest from April 1, 1861, and prayed judgment accordingly.

The answer of Ripley and Hoyt in that suit denied each and every allegation in the complaint.

It was proved on the trial of this action, that on the trial in the marine court, evidence was given of the sale and delivery of the goods, and that they were sold on a credit of eight months. G. B. Bonta, the person who made the sale, was asked with reference to his testimony on the former trial, thus :

Question. Did you not testify that the sale was a cash sale, and you applied to them for a note, according to the custom of that kind of sale ?

Answer. I applied for a note; it was not given; it was

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then considered a cash sale, according to the custom of merchants.

It was also proved that the question raised and argued in the marine court was, whether the goods were sold on a credit of eight months, and that this was the very question argued on submitting the case.

The judge who tried the cause testified that he did not recollect on what ground he decided it, "whether on the ground of unexpired credit or on the ground that the sale was made by Bonta individually."

The defendants sought to prove that Bonta sold the goods in his own name and on his own account. No judgment was entered in the docket in the marine court, but there was indorsed on the summons and complaint, in the handwriting of the judge, the words "judgment for defendant, with costs, and ten dollars allowance." On the present trial the judge ordered a verdict for the plaintiffs for \$481.50, the amount of the goods and interest, and the defendants excepted to the decision.

L. S. CHATFIELD, *for defendants.*

G. DEAN and F. A. WILCOX, *for plaintiffs.*

By the court, BOSWORTH, C. J. The defendants have had the goods for which the verdict was ordered and have not paid for them. The question now is, whether the former trial and judgment therein are a bar to a recovery in this action. It is quite clear that, on the trial in the marine court, as in this, the evidence of the sale of the goods, at the agreed price of \$450, on a credit of eight months, was uncontradicted. The evidence on this trial shows that, in the suit in the marine court, Bonta testified that he sold the goods as agent of the plaintiffs, and so informed the defendants at the time of the sale. It does not appear that there was any attempt to contradict him, and no evidence, in conflict with such being the facts, was given on this trial.

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This case comes, therefore, to this point: Judgment was given for the defendants, in the marine court, on uncontradicted proof that the sale was on a credit of eight months, which had not elapsed. It cannot be conjectured that it proceeded on any other ground or fact. On what ground, or fact found, the judge decided it, he does not recollect, and we lay his testimony out of view. But it does appear that the only question discussed before him, on the close of the evidence was, whether the credit had expired. I think it should be inferred that this was the only question of fact which he determined adversely to the plaintiffs, and finding that it had not, and it being his duty to so find, he gave judgment for the defendants on that ground and for that cause.

If this be the correct view, then it is clear that it was not determined in the marine court that the plaintiffs did not sell and deliver the goods at the agreed sum of \$450.

If it had affirmatively appeared on the present trial that the judgment in the marine court was given expressly on the ground that the suit was prematurely brought, then *Quackenbush agt. Ekle* (5 *Barb. R.* 469, 472) would be an authority that the former trial and judgment was not a bar. In the present case the contrary does not appear either by the record or the proofs, and presumptively the first judgment could not have proceeded on any other ground.

Quackenbush agt. Ekle is not in conflict with *Morgan agt. Plumb*, (9 *Wend. R.* 317.) In the latter case, the plaintiff was entitled to recover, upon the evidence given. But judgment was given against him contrary to the law and the evidence. His remedy was a review on a case or exceptions; and not by another suit on the same evidence.

It cannot be affirmed, or established inferentially, that the judgment in the marine court determined any fact, except the fact that that suit was brought before the agreed time of credit had expired. As it does not appear that

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any other fact was determined, and as that fact was undisputed and entitled the defendants to judgment, and as presumptively no other fact would have been determined in their favor, I think the former suit and judgment do not bar this action.

The facts that the plaintiffs sold the goods to the defendants at the agreed price of \$450, and that the defendants have not paid any part thereof, have not been passed upon and decided against the plaintiffs. But a fact consistent with them, and proved on the first trial by uncontradicted evidence, viz: that the goods were sold on a credit of eight months, was found in the marine court, and having been found the defendants had judgment.

Holding that such judgment is not a bar to this action does not conflict with the rule that "a fact which has once been directly decided shall not be again disputed between the same parties," nor with the rule that "the judgment of a court of concurrent jurisdiction directly on the point is as a plea, a bar, and as evidence conclusive between the same parties upon the same matter directly in question in another court." (*Jackson agt. Wood, 8 Wend. R. 72; Doty agt. Brown, 4 Coms. R. 72.*)

I think the motion for a new trial should be denied, and judgment for plaintiffs on the verdict ordered.

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SUPREME COURT.

WILLIAM ELLIOTT agt. JAMES KENNEDY.

In the service of notices and other papers in a cause, *made by mail*, the deposit in the post-office is the service, and no distinction is made between notices of trial and any other paper.

A sufficient service is made by a deposit in the post-office, when such service is proper, at any hour of the day, without regard to the closing or departure of the mail.

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Kings Special Term, March 8, 1864.

THIS was a motion to set aside an inquest and subsequent proceedings upon the following facts :

The plaintiff's attorney resides at Croton Falls, in Westchester county, and the office of the defendant's attorney, to which notices to him were directed to be sent, is in the city of Brooklyn. There is a regular communication by mail between those places daily, except on Sunday. On the afternoon of Saturday, the 10th day of October last, but after the usual and regular time for closing the mail at that season of the year, and after the mail on that day had in fact been closed, the plaintiff's attorney deposited a notice of trial of that date for the ensuing circuit court, appointed to be held in Putnam county, on the 26th day of that month. The envelope enclosing the notice was post-marked "Croton Falls, Oct. 12, N. Y." and did not reach the defendant's attorney till the next day, so that in fact he did not receive notice of trial more than thirteen days before the first day of the circuit. He apprised the plaintiff's attorney that he did not deem this due and sufficient notice. On that ground, as well as on the merits, he moved to set aside the proceedings.

PHILIP S. CROOKE, *for the motion.*

ODELL CLOSE, *contra.*

LORR, Justice. I was strongly impressed on the argument of the motion that the proceedings of the plaintiff were irregular. Subsequent examination has, however, led me to a different conclusion.

Notices and other papers in an action may be served, in a case like the present by mail (*Code*, § 408, and 410), and when so made the paper must be deposited in the post-office properly addressed, and the service thereof "shall be double the time required in case of personal service, except service of notice of trial, which may be made six-

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teen days before the day of trial, including the day of service." (§ 411 and 412.) The *deposit* in the post-office is *the service*, and no distinction is made between notices of trial and any other papers. All, of which service is allowed by mail, may be served in the same way, and no limitation is made or direction given as to the time of day the deposit shall be made. In the latter respect there is an essential difference from the rule as to the service at an attorney's office or residence, or the party's residence when not made upon the attorney or party himself. If it is made at the office of the attorney when there is no clerk therein or person having charge thereof, or at the residence of the attorney or party, it must be made between the hours of six in the morning and nine in the evening. (§ 409.)

This provision in the specific cases mentioned fairly justifies the inference and conclusion that the service may be made upon the attorney or party personally, or by a deposit, in the post-office, when proper, at any hour of the day, and such has been the general understanding of the practice. It was indeed conceded by the defendant's counsel that such was the rule in regard to services by mail when double time was allowed, but that the practice was intended to be changed when the amendment of the Code in 1859, in relation to notices of trial was made, which only required two days more time to be given by mail than when served on the attorney personally, or at his office or residence, and that the party was not at liberty to withhold the deposit of such a notice until after the closing of the mail, which would necessarily have the effect of reducing the time one day.

That argument appeared to me to be entitled to much weight. It would certainly be reasonable that full sixteen days after the departure of the mail containing the notice should elapse to make it effective, when fourteen days are required in cases of personal service. But, as I before

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have stated, there is no distinction made in that respect, or in any way between the different kinds of notices or papers which may be served by mail. Indeed it would be difficult to make the closing or departure of the mail a rule.

In many places the mail leaves only once a week, in others twice or three times. In the first of those cases it will be seen that if the paper was deposited in the morning of the sixteenth day before the day of trial, and which is expressly included in the computation of time by, (§ 412,) it might not leave till six days afterwards. Upon the whole I see no authority for any limitation as to the right of making the deposit at any time of the day specified. The plaintiff's proceeding was therefore regular, but as the question appears to be new under the amendment referred to, and an affidavit of merits has been filed, I deem it a proper case to give the defendant an opportunity to try his case, and as the plaintiff's attorney did not answer the defendant's letter, in which he stated that he deemed the notice short, I shall allow the costs of the motion to the plaintiff if he succeeds, and not as a condition of the relief granted. The judgment and execution, if issued, to stand as security.

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NEW YORK SUPERIOR COURT.

ISAAC W. EDSALL agt. JAMES BROOKS and others.

"§ 1. No reporter, editor or proprietor of any newspaper shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings of any statement, speech, argument or debate in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of the publication.

"§ 2. Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor or proprietor from an action or indictment for any libelous comments or remarks superadded to and interspersed or connected with such report." (*Law 1854, ch. 130, p. 814.*)

Independently of this statute, the publication of a judicial trial, fairly reported and without express malice, is not actionable. Both at the common law and under the statute, a *privileged* communication or report of a public official proceeding is libelous if there be proof of *actual malice*; otherwise no action will lie. The law will presume malice in all cases where the publication is *not privileged*.

The plaintiff brought his action against the defendants to recover damages for a libel upon him, published in the newspaper of which the defendants are editors and proprietors, in the following words: "BLACK MAILING BY A POLICEMAN.—Isaac W. Edsall, of the twenty-sixth precinct, city hall police, has been dismissed from the public department, by the commissioners, on charges of black-mail preferred against him by citizens in three distinct cases."

Held, that these remarks or comments of the defendants, superadded to their published history of the trial before the police commissioners, were *not privileged*—were unfair and untrue deductions from the facts disclosed on the trial, and for the publication of which they were deprived of the benefits of the statute and were liable in this action.

New York General Term, March, 1864.

Before MONCRIEF and MONELL, Justices.

THIS action was to recover damages for a libel upon the plaintiff published in the New York Evening Express, of which the defendants are the editors and proprietors.

The alleged libel is in the following words:

"BLACK MAILING BY A POLICEMAN.—Isaac W. Edsall, of the twenty-sixth precinct, city hall police, has been dismissed from the public department, by the commissioners,

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on charges of black-mail preferred against him by citizens in three distinct cases."

The answer of the defendants, after admitting the publication of the alleged libel, sets out the entire article, of which the alleged libel forms a part only. The article alleges that "the first charge is by Cornelius W. Gibson, of Brighton, C. W., who alleges that on the 10th day of April he was in this city, intending to go to British Columbia by the California steamer, and he was induced to go into a Peter Funk auction store, in Cortlandt street, and there purchased a watch that was warranted gold for \$120. The watch turned out to be worthless, and, after some very sharp practices by the Funks, the watch being resold, the victim bought an equally worthless one for \$75, but succeeded in getting \$25 back, for which he had to pay a commission of \$6, thus losing \$56. The following Monday, the 4th, he applied to the police, and Edsall was sent to work up the case. He brought up the parties before the mayor, and they were discharged on refunding the money. Gibson then gave Edsall \$5 for his trouble.

" Amos C. Yeomans, also a Canadian, made an affidavit that he was caught in the trap by the Peter Funks, and cheated out of \$59 by the same process as his friend Gibson, and at the same place; that on applying to the police Edsall was detailed to attend to the case, and succeeded in recovering the money for him, and he, Yeomans, made him a present of \$4.

" In answer to these charges the officer stated on his trial that after he had recovered the money for the parties they pressed him to take the money as a present, when he said that policemen were not allowed to take any gratuity without permission from the board of commissioners; they still pressed him, and he took the money conditionally, intending to deposit it with the commissioners preparatory to receiving their permission. He was very busy all that

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day, and could not call on the commissioners. He also stated that on the same afternoon sergeant Cleary and officer Doyle, of the same precinct, called on Gibson and Yeomans and induced them to make the above statement before the chief clerk.

"Commissioner Acton stated on the 18th, two days after the complaint was made, and after Edsall had had notice of trial, the \$9 was deposited by him with the commissioners.

"There was another affidavit sworn to by John W. Allen, who had been cheated on the 27th of March last by the Peter Funks out of \$50. Edsall recovered the money for him, and he paid him \$5 for his trouble. On being shown this affidavit, Edsall became quite indignant, and said: 'I deny that in toto. I never had anything to do with Mr. Allen's case, to my recollection, and I deny taking any money from Mr. Allen. These were the only cases where I have had money tendered me (referring to the cases of Yeomans and Gibson.) I admit I received the money in these cases to appropriate it in accordance with the rules of the department.'

"On the book of captain Silvey, of the twenty-sixth precinct, appears the following entry under date of March 27th:

'Officer Edsall recovered \$48 from No. 1 Park row, for John W. Allen, of Portland, Me., settled by the mayor.'

"This seemed conclusive to the commissioners, and Edsall was immediately discharged from the department.

"Officer John Cronk, of the Broadway squad, has been selected by mayor Opdyke in the place of Edsall, and has been transferred to the mayor's office."

The answer further alleges that charges were preferred against the plaintiff before the said commissioners, a trial had, and the plaintiff was, by the judgment or decision of the said police commissioners, dismissed from the said department; and that the publication was and is, in all re-

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spects, a just, fair and impartial account or statement of the charges, trial and dismissal of the plaintiff from the police department, by a legally constituted public judicial tribunal; and that the printing and publishing of which is in all respects privileged, and was published with good motives and for justifiable ends.

Upon the trial the defendants gave in evidence a copy of the record of the proceedings before the police commissioners, upon the trial of the plaintiff upon the charges preferred against him. The charges were the same as those stated in the *Express* article and the plaintiff was removed from office. The plaintiff was charged with violation of the rules and regulations of the police department.

At the close of the evidence the justice dismissed the complaint.

From this judgment the plaintiff appealed.

A. SANDFORD, *for appellant.*

C. LAWTON, *for respondent.*

By the court, MONELL, J. Independently of the statute of 1854 (*Laws of 1854*, p. 314), the publication of a judicial trial, fairly reported and without express malice, is not actionable. The statute is not, therefore, in aid of the common law, but a mere legislative enactment of it. While the statute protects the editor of a newspaper from an action, for a fair and true report of any judicial, legislative or other public official proceeding, except upon proof of actual malice, it expressly withdraws its protection for any libelous comments or remarks superadded to or interspersed or connected with such report. Both at the common law and under the statute, a privileged communication or report of a public official proceeding is libelous if there be proof of actual malice; otherwise no action will lie. The only distinction, therefore, between a privileged report and one that is not privileged, is in the

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honest purpose or evil design with which it is made and published; and the law will presume malice in all cases where the publication is not privileged.

The libel complained of in this action is contained in the prefatory remark or syllabus which is prefixed to the report of the proceedings before the commissioners of police. It is "Blackmailing by a Policeman," and states that the plaintiff has been dismissed from the police department by the commissioners on charges of "black mail preferred against him by citizens in three distinct cases." If, then, these superadded remarks are in themselves libelous, and not a just, fair and true deduction from the proceedings had before the commissioners (which the defendants undertook to report and publish), the defendants are deprived of the benefits of the statute, and are liable in this action.

The charges preferred against the plaintiff, and for which he was subjected to a trial, resulting in his removal from office, were that he had improperly received money for his services, rendered in the performance of his duty. The proof to establish these charges was, that after being detailed to investigate complaints of frauds committed by mock auctioneers, and having succeeded in recovering the amounts of which the parties had been defrauded, he accepted, as a voluntary gift, from the persons whose money he had recovered, in one case \$4 and in two other cases \$5 each.

The plaintiff stated on his trial that he received the money conditionally, intending to deposit it with the commissioners, preparatory to receiving their permission.

Although the members of the metropolitan police are prohibited from sharing, for their own benefit, in any present, fee or gift, for police service, yet the board of police are authorized by statute (*Laws 1860, p. 456, § 65*) for meritorious and extraordinary services, rendered by a member of the police force in the due discharge of his duty, to permit

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such member to retain, for his own benefit, any reward or present tendered him therefor; and it is made cause of removal for a member to receive a reward without giving notice thereof to the board.

The offence, therefore, is not in receiving the reward, but in omitting to give notice to the board; and the cause of the plaintiff's removal from office was in neglecting to notify the board that the gratuity had been received by him.

The guilt or innocence of the plaintiff of the charges preferred is not involved in the question now before us. It is sufficient that he was, by a competent authority, adjudged to be guilty; and the publication of the "proceedings" before the commissioners is protected.

I have no difficulty in determining that the comments of the defendants upon the charges against the plaintiff, disconnected from the report of the trial, were libelous. Any publication which is calculated to injure the character of a person, or to degrade him in the public estimation, is libelous. (*Weed agt. Foster*, 11 *Barb.* 203.) To charge a public officer with "black mailing," and to assert that he has been dismissed for that cause, was calculated to degrade and bring him into disrepute, resulting in injury to his character with the public. "Black mail" (from *maille*, French, signifying a small coin) is defined to be a certain rent of money, coin, or other thing paid to persons upon or near the borders, being men of influence, and allied with certain robbers and brigands, to be protected from their devastation. (*Wharton's Law Lexicon*, 101.) Substantially, we now attach the same meaning to the term. In common parlance, and in general acceptation, it is equivalent to, and synonymous with, extortion—the exactation of money, either for the performance of a duty, the prevention of an injury, or the exercise of an influence. It supposes the service to be unlawful, and the payment involuntary. Not unfrequently it is extorted by threats,

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or by operating upon the fears or the credulity, or by promises to conceal, or offers to expose, the weaknesses, the follies or the crimes of the victim. There is moral compulsion, which neither necessity, nor fear, nor credulity, can resist.

It cannot be doubted, I think, that the term "black mailing" is invariably regarded as an unlawful act; and though, from its indefiniteness and comprehensiveness, the offence is not classified as a distinct crime, nevertheless, it is believed to be criminal, and, to charge a man with "black mailing," is equivalent to charging him with a crime.

The complaint against the plaintiff was not of a crime. He had not violated any law. He had not extorted money by threat or promise. He had received a voluntary gift, and the penalty of his neglect, to notify the board, was visited upon him by his removal from office.

Under the facts of this case, I cannot persuade myself that the defendants made either a fair or a truthful deduction from the charges against the plaintiff; nor of the course which led to his removal from office. I do not impute to the defendants any evil design or malignant intent to defame the plaintiff. They may and most probably did intend to do no more than to fairly characterize the offence charged; but they were unfortunate in the use of words conveying a different meaning; and however proper it may be to urge these considerations in mitigation of damages, the defendants must be held responsible for the injury which the law presumes the plaintiff has sustained.

In *Thomas agt. Croswell* (7 John. R. 264), the alleged libel was contained in a newspaper account of a legislative appointment, the court (SPENCER, J.) say "there is no *dictum* to be met with in the books, that a man, under the pretense of publishing the proceedings of a court of justice, may discolor and garble the proceedings by his own

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comments and constructions, so as to effect the purpose of aspersing the character of those concerned."

In *Stanley* agt. *Webb*, in this court (4 *Sandf.* 21), the article complained of was headed "Extorting money to hush up the complaint," and then followed a history of the proceedings before the magistrate. The court held the heading not to be privileged. So in *Clement* agt. *Lewis* (3 *Brod. and Bing.* 297), the heading to an article, "Shameful conduct of an attorney," was held not to be privileged. It was superadded to an account of proceedings in the insolvent debtors' court.

Our conclusions are that the comments of the defendants superadded to their history of the trial before the police commissioners are not privileged—are unfair and untrue deductions from the facts disclosed on the trial, and for the publication of which the defendants are liable in this action.

We are therefore of opinion that the judgment should be reversed, and a new trial granted.

Ordered accordingly.

SUPREME COURT.

GEORGE W. JONES, respondent, agt. WILLIAM H. SEWARD,
appellant.

In an action against a civil officer of the United States for damages in causing the arrest and imprisonment of the plaintiff, where the defence interposed is, that such acts were done under and by the authority derived from the President of the United States, the defendant is entitled, by virtue of an act of congress passed March 3, 1863, entitled, "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases," to have the action removed into the circuit court of the United States.

On an application by the defendant for the removal of such an action from the state court to the circuit court of the United States, the question is not whether the act of March 3, 1863, affords a valid defence to the action, but whether congress has the power to give the circuit court jurisdiction of the case.

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The defence in the case arises under an *act of congress*, and it is sufficient for the state court that the defence involves the construction and effect of such act, under the constitution of the United States; it therefore comes within the judicial power of the United States, and congress can confer upon the circuit court jurisdiction over it.

Congress can give the circuit court of the United States *original jurisdiction* in any case to which their *appellate jurisdiction* extends. (*This decision reverses S. C. at special term, ante, 33.*)

New York General Term, March, 1864.

Before LEONARD, P. J., SUTHERLAND and CLERKE, Justices.

APPEAL by defendant from the decision of the special term denying defendant's application to remove the cause to the circuit court of the United States. (*Reported ante, p. 33.*)

JAMES T. BRADY and **W. C. TRAPHAGEN**, *for appellant.*
JOHN McKEON and **MR. MEAD**, *for respondent.*

LEONARD, J. The question is not whether the fourth section of the act of congress, passed March 3, 1863, affords a valid defence to the action. The true question is this: is it in the power of congress to give the circuit court jurisdiction of the case?

The constitution extends the judicial power of the Union to all cases in law and equity arising under the constitution, laws and treaties of the United States.

The defence in this case arises under the act of congress, and the validity of that act, considered in the light afforded by the constitution, will be one of the principal subjects to be determined at the trial. It has been decided that a case arises within the meaning of the constitution as well when the defendant seeks protection under a law of congress, as when a plaintiff comes into court to demand some right conferred by law.

It has been objected that the original jurisdiction of all actions may be drawn into the federal courts by similar enactments of congress, and that the case arises within the meaning of the constitution only after a trial and

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judgment in this court, when the action can be transferred by writ of error or appeal, and brought before the federal courts for review.

The power of transferring causes to the United States circuit in a similar manner, where the question involved was of an appellate and not original jurisdiction, has long been sustained.

Chief Justice MARSHALL says, in the case of *Osborn* agt. *The Bank of the United States* (9 Wheaton, 821), "we perceive no ground on which the proposition can be maintained that congress is incapable of giving the circuit courts original jurisdiction, in any case to which the appellate jurisdiction extends."

Congress has enacted that the defendant may interpose in his defence the orders, &c., of the President, and has directed the transfer of cases involving such a defence, in the manner prescribed, into the circuit court.

According to the statements of the defendant such a case has arisen. We have nothing to do with the validity of the law as a defence to the action. It is sufficient for the state court that the defence involves the construction and effect of a law of congress. The case has then arisen when the courts of the United States may have jurisdiction, if congress so direct. If the law does not afford a constitutional or valid defence, it cannot now be doubted that the learned justices of the United States courts will so declare it, when the jurisdiction of such cases will remain in the state courts, as before the enactment of the law. It is not our duty to assert the independence of our state sovereignty and jurisdiction; for the final construction and effect of all acts of congress may be brought before the United States courts by the express provision of the constitution. The manner of taking the cause to those courts is of consequence. The supreme court of the Union must be relied on to prevent its jurisdiction from being unlawfully extended by congress. I am of the opinion

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therefore, that congress has the power to direct the transfer of such cases.

In my opinion this application was unnecessary in order to vest the United States circuit court with the possession of the action, but the discussion has not been lost, inasmuch as it will be now settled that this court will not, in this judicial district, take further cognizance of cases which have been transferred under this act of congress. It is very proper that an order be entered transferring the cause to the United States circuit, as it affords the evidence in the court of the disposition made of it.

In arriving at my conclusions I have consulted *Story's Com. on the Constitution, chap. 38, §§ 903, 906, &c.*; *Martin agt. Hunter, 1 Wheat.*; *Cohen agt. The State of Virginia, 6 Wheat.*; *Osborn agt. The Bank of the United States, 9 Wheat.*

As a rule of practice I think the court should not approve any sureties unless the amount of bond is equal to the sum in which the defendant in the action has been held to bail, if bail has been required in the state court. This fact should be made to appear to the satisfaction of the judge to whom the bond is presented for approval.

The decision in this case will also embrace the case of *Gudeman agt. Wool*, argued at the same general term as the present case.

The order appealed from should be reversed, and the motion below should be granted without costs.

SUTHERLAND, J. The question is not as to the constitutionality of the fourth section of the act, declaring that the order or authority of the President, during the rebellion shall be a defence in all courts, to any action for any arrest, imprisonment, or act done, or omitted to be done, under or by color of the President's order, or of any law of congress: but the question is as to the constitutionality of the fifth section of the act, authorizing the defendant in any such action to remove the same from the state court to the circuit of the United States for the district where

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the suit is brought for trial, on complying with certain requirements specified in the section, that is, on entering his appearance, filing his petition stating the facts, offering good and sufficient surety, &c.

The question presented by this appeal is not as to the constitutional power of the President to order the arrest, imprisonment, &c., or as to the constitutional power of congress to authorize the President to order the arrest, imprisonment, &c.; but the question presented by the appeal is, as to the constitutional power of congress to give the circuit courts of the United States primary or original and (as to the state courts) exclusive jurisdiction, of the trial of actions for such arrests, imprisonment, &c.

In determining the question as to the constitutionality of the fifth section of the act, we must assume, I think, that the trial of this action will involve the determination of the question as to the constitutionality of the fourth section; that congress in passing the act considered that the trials of the actions to be removed to the circuit courts of the United States under it would involve the determination of the question as to the constitutionality of the fourth section, whether tried in the state or United States courts; and that congress intended by the fifth section to take from the state courts and give to the circuit courts of the United States the right and power to determine that question.

Had congress the constitutional power to do this? That is the question.

If congress had the power, then the order appealed from, denying the defendant's motion to remove the action and all proceedings therein to the circuit court of the United States, for the southern district of New York, should be reversed, and I think an order made directing such removal; if congress had not the power, then the order appealed from should be affirmed.

If no steps had been taken for the removal of the action

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from this court, and the action should be tried in this court, and the question as to the constitutionality of the fourth section of the act should be decided adversely to the defendant by the court of appeals of this state, the supreme court of the United States would have final and conclusive appellate jurisdiction of the question. (*Const. U. S. Art. 3, § 25, of the Judiciary act; 1 Stat. at Large, 85; Cohen agt. Virginia, 6 Wheaton, 204; Miller agt. Nicholls, 4 Wheaton, 311.*)

Cannot congress give the circuit court of the United States original jurisdiction in any case to which this appellate jurisdiction extends?

In *Osborn agt. United States Bank* (9 *Wheaton*), cited by Judge LEONARD, Ch. J. MARSHALL said he could perceive no ground for saying that congress could not.

In that case one of the questions was, whether congress could constitutionally confer on the bank the right to sue and be sued "in every circuit court of the United States."

It was held that such a suit was a case arising under a law of the United States, consequently that it was within the judicial power of the United States, and congress could confer upon the circuit court jurisdiction over it.

See also *Curtiss' Com. on the Jurisdiction, &c., of the Courts of the United States*, §§ 12 and 13; the latter section, containing a quotation from another portion (p. 865) of the opinion of Chief Justice MARSHALL in *Osborn agt. The Bank of the United States*, apparently quite pertinent to the question in this case.

I concur, then, in the conclusion of Judge LEONARD, that congress had the power to direct the transfer to the circuit court of the United States.

Probably an order of this court directing such transfer is not absolutely necessary, but to make one would be in accordance with usage in like cases; and besides, such an order would be the best evidence of the determination of this court, that it no longer had jurisdiction of this action.

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It appearing that the defendant has complied with the requirements of the act for such transfer, the order appealed from should be reversed, and an order made by this court for the removal of the action and all proceedings therein to the circuit court of the United States.

CLERKE, J., dissenting. I see nothing whatever in the arguments of my brethren, or in those of other judges on the same subject, to induce me to recede from the position which I have attempted to maintain at special term. They have all alike, in my very humble judgment, unaccountably overlooked the only point claiming consideration on this great constitutional subject.

According to the doctrine upheld by my brethren, we can scarcely conceive of any act committed by any officer of the general government under color of any authority derived from or under the President, which may not constitute a genuine, veritable case arising under the constitution of the United States, and which, therefore, may not rightly come within the cognizance of their judicial power. It is only necessary to claim that it was committed under color of that authority, and was, therefore, justified by the constitution, however monstrous and appalling the act may be, to make it, according to this doctrine, a case arising under that constitution. For, of course, according to the terms of the claim, the claimant appeals, through this remarkable statute, to the constitution for his justification, and, however, palpably frivolous such a claim may be—however palpably manifest may be the conviction that the constitution no more sanctions such an act, than it sanctions the burning of the capitol, the dispersion of congress and the shooting, imprisonment or exile of the men of whom it is composed, yet it is claimed to present a question, and, therefore, a case arising under the great charter of constitutional liberty in America, the perpetrator of the outrage making that a question, which is unquestionably no question ; and the judicial power of the state is ousted

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of its legitimate jurisdiction. Thus, this extraordinary statute prescribes not only that the character, but the mere assertion, of the wrong-doer shall determine jurisdiction, and that the subject matter, which has been always held, except in cases affecting ambassadors, other diplomatic ministers and consuls, as alone the criterion of jurisdiction, shall be excluded from consideration. Surely, if this can be done by congress, the government of the United States of America is not as all men have heretofore supposed, incontestably a government of limited powers and duties, and is, if not one of unlimited powers and duties, nevertheless, of very accommodating expansibility. This is a novel and strange theory of development in America.

But, it is asserted, as the appellate power of the supreme court of the United States extends in certain cases to state tribunals, that this case would after judgment reach the federal jurisdiction, and that, therefore, it may as well be transferred to the United States circuit court before judgment. Even if the supreme court of the United States would entertain such a case on appeal, this is no controlling reason why it should, necessarily, be transferred to the United States circuit for adjudication in the first instance.

For, the only question to be determined by us on this motion is, whether congress has the power to transfer cases of this description to the circuit court of the United States, not whether, ultimately, it may reach the appellate jurisdiction of the United States supreme court. The act of congress, passed in 1789, "to establish the judicial courts of the United States," no doubt provides that a final judgment or decree in any suit in the highest court of law or equity of a state, where is drawn in question the validity of a statute of the United States, and the decision is against its validity, may be re-examined and reversed or affirmed in the supreme court of the

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United States. But, it is too clear for controversy that the statute is an outrage on the constitution, if it is palpably usurpation, if it is plain to the most unlettered citizen, that the statute is an attempt to subvert all the securities which the founders of the government have provided for the preservation of personal liberty, and to invest one man with unlimited dictatorial power, and, therefore, that the appeal was palpably frivolous, I presume the court would hear no argument on such an appeal, and would, forthwith, affirm the judgment or dismiss the writ. Would they, for instance, hearken to an appeal involving the validity of an act of congress giving the president or any other member of the government power, by a *coup d'etat*, to extinguish the legislative branch, as Cromwell did the long parliament, and substitute a Barebone's legislature in its place? Surely not; if they, too, were not struck down, and were not (if said debasement can be imagined) by force, by fear, or by corrupt appliances or selfish aspirations robbed of independence. So that, the consideration, whether the act is not palpably void, must present itself on appeal as it now presents itself to us on this motion; and, if it is palpably void, I repeat, it would not be treated on appeal as worthy of being for a moment entertained. I still consider the defence in this case just as destitute of color as the case which I have imagined. Whether, under the pretext of authority from the President of the United States, any one citizen, at his mere will and pleasure, without any intervention of the judicial tribunals, can incarcerate another citizen not subject to military law, in a loathsome dungeon, for many months, or for a day or an hour, cannot, under any circumstances in which the nation may be placed, be treated as a question constituting a case arising under the constitution; and any statute which declares the contrary is palpably void.

The order at special term should be affirmed with costs.

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NEW YORK SUPERIOR COURT.

GEORGE W. PLATT and NATHAN C. PLATT agt. HENRY WELLS, President of the American Express Company.

Where an *express company* show by *prima facie* evidence that they either delivered a box of goods to the authorized agent of the person to whom it was addressed, or that the *seller* of the goods from whom the company received the box had *sanctioned the delivery* to such alleged agent; in either case the company are discharged from liability to the seller for the non-delivery of the goods to the *person* to whom the box was addressed.

General Term, February, 1864.

Before ROBERTSON, C. J., GARVIN and McCUNN, JJ.

IN June, 1855, the plaintiffs, merchants in the city of New York, made a *conditional sale* of jewelry of the value of \$8,500 to Larue P. Anderson. The conditions were that it was to be paid for in a note, to be signed by Anderson and one Daniel C. Munro, and guarantied by one John Munro, payable in one year from date, and that the jewelry should be sent by plaintiffs to Daniel C. Munro, to be by him delivered to Anderson, upon the making and delivery to plaintiffs of the promissory note above described.

The goods were delivered by the plaintiffs to the American Express Company, for carriage, on the 9th day of June, 1855, directed to "Daniel C. Munro, Elbridge." Elbridge was the residence of Daniel C. Munro. Defendants agreed to forward the box to "Junction," a place near the residence of Munro. On the 11th day of June the box arrived safely at "Junction," on the same day Anderson went to the house of Daniel C. Munro and told him that he was expecting a box of goods from New York, which was directed to him (Munro) and asked Munro to go with him to get it. Munro replied that "he could not go at that time, that he (Anderson) could get the box just as well without him as if he was there."

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Anderson said "he did not know as they would let him have the box." Munro told him "he thought they would; that he (Anderson) could get the box as well without him as with him; that he could get the box." Munro had not received any notice from the plaintiffs that the box had been sent to him. The plaintiffs had mailed a letter to Munro on the 9th of June, informing him that the box had been forwarded, marked to him; they also enclosed to him in the letter a note to be signed by him for the goods in pursuance of the understanding between plaintiffs and Anderson.

This letter was never received by Munro, and he was entirely ignorant of the arrangement and understanding between plaintiffs and Anderson in regard to the terms and conditions of the purchase of the goods, or that the goods were to be forwarded to him, or that he was to have anything to do with them.

After the interview between Anderson and Munro on the 11th of June, Anderson went directly to the railroad depot, and got the box; he placed it in his wagon and returned with it to Munro's house. He told Munro he had the box; he was asked to bring it in; he expressed an unwillingness to do that, but requested Munro to come to Auburn the next day. Munro went next day to Auburn, saw the jewelry and got from Anderson about \$300 in value of it in payment of a debt Anderson owed him.

On the 14th of June plaintiffs received a letter which purported to be written by Anderson and Munro, enclosing a note for \$8,500 for the goods in question, signed with their names, and purporting to be guaranteed by John Munro. The letter and note as to Munro were forgeries. The note was drawn payable in one year. The forgery was not ascertained by plaintiffs until the maturity of the note.

On the same day that the plaintiffs received the note they also received a letter from Anderson stating that he

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had received the goods and he pointed out to plaintiffs an error in the invoice.

In June, 1856, after the forgery was discovered plaintiffs sued Anderson on the note in the district court in the state of Wisconsin, alleging, among other things, that the note was given for "goods sold and delivered."

The express company was ignorant of the agreement or understanding between Anderson and the plaintiffs in regard to the sale of the goods, and the reasons of their being forwarded to Munro.

This action was commenced in May, 1861. The issues were referred for trial to the Hon. B. W. Bonney as sole referee, who reported in favor of the defendants.

The referee deciding that the delivery by the American Express Company of the box, under the circumstances, was a sufficient performance by the company of their contract or obligation to deliver the same, and exonerated the company from any liability to the plaintiffs therefor.

From the judgment rendered in favor of the defendants upon the report of the referee the plaintiffs appealed to the general term of this court.

WILLIAM R. MARTIN, *for appellants.*

HOOPER C. VAN VORST, *for respondents.*

By the court, ROBERTSON, Chief Justice. Mr. Munro, to whom the box of jewelry in question was directed, had neither made, or offered to make, any contract with the plaintiffs. That fact was not communicated to the defendants. They were equally ignorant of whatever fraud, if any, had been perpetrated by Anderson in inducing the plaintiffs to send it so directed. Their duty ended with delivering the goods either to Munro or some one authorized by him to receive them. Whether Munro was a party to the fraud, in taking possession of them, or was deceived by Anderson, in procuring authority from him to receive

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them, was immaterial to the defendants. Munro was the trusted agent of the plaintiffs, if not the presumptive owner of the goods, so far as they were concerned. (*Sweet agt. Barney*, 23 N. Y. R. 335, 6; *Everett agt. Sat-tus*, 15 Wend. R. 475; *Fitzhugh agt. Wiman*, 5 Seld. R. 562.)

Munro knew that Anderson meant to buy jewelry in New York, for he had refused to endorse his note for the purpose, but was destitute of any information from the plaintiffs, as to the sending of the box, or the object of its direction. Under these circumstances, Anderson, on calling on him, informed him he (Anderson) had a box containing jewelry directed to him (Munro) which had been so directed, at the request of one of the plaintiffs, and asked him to get it because it was so directed. Munro first said he (Anderson) could get it just as well without him as if he were there. To which Anderson replied, he did not know as they would let him have the box. Munro said he thought they would; that he (Anderson) could get the box as well without him as with him. When Anderson repeated they would not let him have it, Munro again said he thought they would, but finally told him "to get the box." Upon this Anderson immediately left to get the box, brought it to Munro's house, told him he had it, declined to bring it in, and carried it away. Munro not only made no objection to all this, but subsequently received from Anderson part of the contents in payment of an old debt. He was so strongly impressed with the belief that he did authorize Anderson in some way to get the box that he testified that he did not know but that Anderson asked him if he (Anderson) should tell them that he (Munro) told him he might get it, and if he did he (Munro) told him to say so. This, it is true, is merely hypothetical, when standing alone, but when taken in connection with the rest of Munro's testimony, is strong evidence of the impression on his mind that he had been ap-

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plied to by Anderson for authority to get the box, and that he used some language warranting Anderson in getting the box as his agent. Without such authority the latter, in order to get it, must have been guilty of the crime of obtaining it by false pretences, or a constructive larceny. Munro then knew that Anderson applied to him for authority, and immediately went to get the box on the strength of what he said, obtained it, and brought it to his (Munro's) door, and carried it away, he subsequently receiving part of the contents. After what passed he must have supposed that Anderson used his name to get the box, or in some way induced the defendants to believe he had his authority for getting it; yet he seems to have made no inquiry on the subject, nor does he appear to have warned the defendants that they had delivered the box without authority. Probably he thought he never could be made liable, provided he did not receive the box personally. He had made no personal contract with the plaintiffs. Anderson procured the box to be sent on, and was the party to be benefited; it was sent to a station near his house, and might have been a matter of mere accommodation.

There was, therefore, at least some evidence that the defendants delivered the property in question to Anderson as Munro's authorized agent. Besides this, the plaintiffs, a few days afterwards, received a letter from Anderson stating that he had examined the goods sent with the bills and found all correct, with certain specified exceptions; to which the plaintiffs replied, explaining the objections. A note signed by Anderson for the price of such goods, with forged signatures, was received by the plaintiffs, not to become due until a year afterwards. The latter, on discovering the forgery, which was after such note became due, commenced a suit on it in Wisconsin against Anderson, in which an attachment was issued.

One of the plaintiffs, in an affidavit made to obtain such

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attachment, stated that such note was given for a valuable consideration, to wit: *for goods sold and delivered*. The plaintiffs, after the notice to them by the correspondence with Anderson, that the goods had been delivered to him, thereby ratified such delivery. (2 *Kent's Com.* 7th ed. 480; *note cases cited*; *Green agt. Clark*, 5 *Denio R.* 503.)

It is true they were probably induced not to make any objections or inquiry for a year by the forged note; but, after the discovery of such forgery, they still assumed the ownership of the note by suing upon it, and swearing that it was received for goods sold and delivered, and thereby were enabled to seize certain goods. The defendants never heard an objection to the delivery until a short time before they were sued, and after the suit against Anderson; although as between the plaintiffs and Anderson the delivery or rather retention of the goods by the latter, by the agency of a forged note, would not have prevented the former from reclaiming them. Yet if the plaintiffs had even by such means been induced to sanction their delivery by the defendants, they would thereby have discharged the latter from liability as carriers. They not being parties thereto, were not responsible for impositions practiced on the plaintiffs by Anderson to induce them to sanction the delivery after knowledge of it.

The referee has not found expressly the agency of Anderson in receiving the goods for Munro, or the sanction by the plaintiffs of their delivery. One or the other was necessary to sustain his report and judgment; but there is sufficient *prima facie* evidence of both. They are certainly at least not so clearly disproved as to warrant an interference with such judgment.

The judgment must be affirmed with costs.

Mariposa Company agt. Garrison.

SUPREME COURT.

III

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THE MARIPOSA COMPANY agt. CORNELIUS K. GARRISON.

An injunction from this court will not be granted to restrain an action pending in the United States court.

And injunction will not ordinarily be granted to prevent acts, the commission of which is not alleged to be apprehended.

An injunction is not necessary to prevent property being conveyed by the defendant to a *bona fide* purchaser, where all the rights of the plaintiff must be determined by the construction to be given to written instruments which are recorded; as any purchaser would take with notice of them and be bound by them the same as the defendant is.

Although this court by having jurisdiction over the person of the defendant, may compel specific performance of a contract in relation to lands situated in another state, still the granting of a preliminary injunction is matter of *discretion*. And where the plaintiff has adequate remedies for the preservation and enforcement of all his rights in the courts of another state, involving rights to land in that state, or in the United States courts; it is not sound discretion to aid by injunctions in drawing within the jurisdiction of this court, the decision of those questions which can more appropriately be investigated and determined elsewhere.

New York Special Term, February, 1864.

THIS action was brought in November, 1863, by the plaintiffs, a mining company of the city of New York, operating in California, and owning the celebrated tract there known as "*Las Mariposas*," to clear up certain clouds on the title to said tract arising from an agreement made between Mark Brumagin, Trenor W. Park and John C. Fremont, in February, 1860, for the purpose of saving to the then owner of the tract, John C. Fremont, the privilege of redeeming the same from a sheriff's sale thereof, made in 1858, on a judgment obtained against him for \$7,846.97.

An injunction was obtained by the plaintiff, and afterwards, on affidavits of the defendant, Justice BARNARD granted an order to show cause why the same should not be dissolved.

The matter came before the court on argument of this motion.

— — — for plaintiff.

— — — for defendant.

Mariposa Company agt. Garrison.

BARNARD, J. An injunction will not be granted to restrain an action pending in the United States court. So far as the injunction seeks to restrain other acts of the defendant, whereby he may endeavor to get possession of the land, the complaint does not allege that defendant is about or threatens to do any other acts further than the action already commenced in the United States court.

An injunction will not ordinarily be granted to prevent acts, the commission of which is not alleged to be apprehended.

As to restraining the conveyance of the property by defendant, it is clear to me that all the rights of the plaintiff must be determined by the construction to be given to the instruments upon the language contained in them. Those instruments are recorded, and any purchaser would take with notice of them and be bound by them the same as the present defendant is. An injunction, therefore, is not necessary to prevent the property being conveyed to a *bona fide* purchaser.

It would appear from the case that where a plaintiff comes into court, and alleges that he has a good defence to negotiable instruments while they are in the hands of the original party, which defence will be lost to him if the securities are transferred to a *bona fide* purchaser without notice, the court will consider the obvious advantage to be obtained by the original holder by so transferring sufficient to justify a well-grounded apprehension that such transfer will be made unless prevented by injunction.

That, however, is not the case here.

The complaint does not allege that defendant is about to or threatens to dispose of the property, and there is nothing in the case to warrant a presumption that he intends so doing, the above principle, which obtains in case of negotiable instruments, not applying to this case.

But, again, although this court having obtained jurisdiction over the person of the defendant has jurisdiction to

People *ex rel.* Cook agt. Board of Metropolitan Police.

compel specific performance of a contract in relation to lands situate in another state, still the granting of a preliminary injunction is matter of discretion. In this case, as in my view, the plaintiff has adequate remedies for the preservation and enforcement of all its rights in the courts of the state of California or in the United States court for that district (in which state and district the land lies), and as to the courts of that state and district, the decisions of the questions raised in this case, involving as they do rights to land there situate, more appropriately belong, I think it is not sound discretion to aid by injunction in drawing within the jurisdiction of this court the decision of those questions which can more appropriately be investigated and determined elsewhere. I have not thoroughly examined the effect of the transfer to Garrison, but am satisfied, upon an inspection of his paper title, that the ownership of the Mariposa estate is by no means free from doubt.

SUPREME COURT.

THE PEOPLE *ex rel.* STEPHEN L. COOK agt. THE BOARD OF METROPOLITAN POLICE.

Under the laws of 1840 (p. 327) and 1844 (p. 402) costs are distinctly allowed on *every certiorari*.

New York Special Term, March, 1864.

MOTION to resettle order of general term made on a common law *certiorari*, and to strike out the allowance of costs.

A. J. VANDERPOEL, for the motion, cited Baldwin agt. Wheaton, 12 Wend. 262; People *ex rel.* Harvey agt. Heath, 20 How. 304; Caldwell's Case, 13 Abb. 405.

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WILLIAM HENRY ARNOUX, *in opposition*, cited *Laws* 1840, p. 327; *Laws* 1844, p. 402; *Laws* 1854, p. 592.

BARNARD, J. At common law, costs were not allowed upon a *certiorari* (16 *How.* 46; 20 *How.* 304; 13 *Abb.* 405; 35 *Barb.* 444.) In 20 *How.* the court say: "none is given, by any statute to which our attention has been called, in a case like the present."

The statutes referred to were the laws of 1854, cited above, and the Code, § 318. It is the duty of counsel to inform the court of the law, and in that case the counsel was properly punished for his lack of diligence in a matter of such personal interest as the laws relating to costs.

In the case under consideration, the laws of 1840 and 1844 have been brought to our notice, and they clearly and distinctly allow costs on every *certiorari*. The decision in *Wend.* is inapplicable, because made prior to the passage of those acts. The other decisions must be disregarded, because it appears that the attention of the court had not been directed to the statutes cited above. (*Ram. Legal Judgs.* 121.)

Motion denied.

SUPREME COURT.

JOHN B. TREVOR, JR., and JAMES B. COLGATE agt. JOHN WOOD and others.

Where parties residing in different states, engaged together in business transactions, agree that their communications to each other shall be made by *telegraph*, it is, in effect, a *warranty* by each party that his communication to the other *shall be received*.

A communication is only *initiated* when it is *delivered* to the telegraph operator; it is *completed* when it comes to the *possession* of the party for whom it is designed.

The rule that has been established by the courts in respect to *contracts* made by letter sent through the *mail*, is not applicable to communications by *telegraph*.

Trevor agt. Wood.

New York General Term, February, 1864.

Present, SUTHERLAND, LEONARD and CLERKE, Justices.

THIS was an appeal from a judgment entered on the report of a referee. The facts are as follows:

The plaintiffs and defendants were respectively partners, as stated in the complaint, and were respectively dealers in specie, exchange and bullion. The plaintiffs doing business in the city of New York, the defendants in the city of New Orleans.

On the 30th of January, 1860, the plaintiffs telegraphed to the defendants as follows:

“To JOHN WOOD & CO.

“At what price will you sell one hundred thousand Mexican dollars, per next steamer, deliverable here?

“TREVOR & COLGATE.”

On the 31st of the same month the defendants answered the above by another telegram as follows:

“TREVOR & COLGATE, NEW YORK:

“Will deliver fifty thousand at seven and one quarter, per Moses Taylor. Answer. JOHN WOOD & CO.”

The word “answer” was on the last dispatch as written by the operator at New Orleans, but was not on the copy delivered to the plaintiffs.

On the same day (January 31st, 1860), the plaintiffs telegraphed to the defendants as follows:

“To JOHN WOOD & CO.

“Your offer fifty thousand Mexicans, at seven and one quarter, accepted. Send more if you can.

“TREVOR & COLGATE.”

On February 1st, 1860, (the next day), the plaintiffs again telegraphed to defendants as follows:

“To JOHN WOOD & CO.

“Accepted by telegraph yesterday your offer for fifty thousand Mexicans. Send as many more at same price. Reply. TREVOR & COLGATE.”

The last above named telegram, as well as that of 31st

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January from the plaintiffs, did not reach the defendants until 10 A. M., on the 4th February, 1860, in consequence of some derangement in a part of the line used by the plaintiffs, above Canton, Mississippi, from noon of January 31st to the morning of February 4th, but which was not known to the plaintiffs until 4th February, when the telegraph company reported the line down.

On the 3d day of February, 1860, the defendants telegraphed to the plaintiffs as follows:

"Messrs. TREVOR & COLGATE, New York.

"No answer to our dispatch 31st. Dollars are sold.

"JOHN WOOD & CO."

Which telegraph the plaintiffs received on the same day and answered it as follows by telegraph on the same day: "To JOHN WOOD & Co.

"Your offer was accepted on receipt and again the next day. The dollars must come or we will hold you responsible. Reply. TREVOR & COLGATE."

On the 4th February, 1860, the plaintiffs telegraphed to the defendants as follows:

"To JOHN WOOD & Co.

"Telegraph company reports line down on the 31st, hence the failure of our two messages. We sold the dollars and must have them by this or the next steamer or we are liable for damages. Don't fail to send the dollars at any price. Will write to-day.

"TREVOR & COLGATE."

On the same day the defendants telegraphed the plaintiffs as follows:

"To TREVOR & COLGATE.

"No dollars to be had. We may ship by steamer 12th, as you propose, if we have them.

"JOHN WOOD & CO."

The steamer Moses Taylor was, in fact, to sail from New Orleans on the 5th February, 1860, and did sail on that

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day at noon, and arrived at New York on the 13th day of said February.

It is usual not to ship specie until the day before the sailing of the vessel.

All the telegrams were punctually transmitted and received on the same day that they were written, except the telegrams of acceptance deposited by the plaintiffs in the office at New York, on the 31st January and 1st February, respectively.

The plaintiffs, by paying an extra price, could have had their telegrams to New Orleans repeated from there so as to be certain that they had been properly transmitted. This they did not do.

It is not usual to have telegrams repeated.

The market price of Mexican dollars, on the 13th February, 1860, was 7 5-8 above par.

In July or August, 1859, an arrangement was made at an interview between the plaintiffs and defendants, that if the defendants had dollars to sell they should telegraph to the plaintiffs, who should answer whether they would take them or not, and that everything between them should be done through the telegraph.

All the plaintiffs' telegrams were sent by the "Interior, or National line," and all the defendants' telegrams by the "Seaboard Telegraph line." These two companies had but one office in New York. The lines of the company employed by the defendants were in running order during all the period in question. The lines of the company employed by the plaintiffs were down on 31st January, in the afternoon, and thence until the 4th of February.

The telegrams of acceptance by the plaintiffs, on the 31st January and 1st February, were not prepaid by the plaintiffs, but were paid by the defendants at New Orleans where the messages were received by them on the 4th of February. The defendants prepaid all their own telegrams.

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The telegraph company employed by the plaintiffs knew that the line was down on the 31st of January, and communicated that fact to the office in New York on the afternoon of that day, or early the next morning, but did not notify the plaintiffs of the fact until the 4th February. That the plaintiffs might have ascertained it by inquiring at the office in New York, on the 1st February, which they did not do.

Both parties acted in good faith. That the defendants waited a time that would have been reasonable under the circumstances and would have been justified in regarding their offer as not accepted, were it not for the rule of law stated by the referee in this case.

The damages sustained by the plaintiffs by the omission of the defendants to forward the dollars was \$187.50, with interest from February 13, 1860, amounting on the day of the date of said report to \$219.53 in all.

Upon the foregoing facts the referee found as conclusions of law as follows, viz :

1st. That the contract between the plaintiffs and the defendants was completed on the same day that the plaintiffs' acceptance of the defendants' offer began to be transmitted by said telegraph company to the defendants, viz : on the 31st day of January, 1860, or as soon thereafter as the telegram could be transmitted by due diligence, which would be on that or the following day, and then the defendants were bound to fill the contract.

To which conclusion of law the defendants duly excepted.

2d. That it was not necessary that the defendants should actually receive the message of acceptance before the contract was binding and effective.

To which conclusion of law the defendants duly excepted.

3d. That the non-payment of their telegrams of acceptance of the 31st January and 1st February did not pre-

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vent or destroy the effect of their deposit in the office in New York and the commencement of their transmission, in completing said contract and binding the defendants to its performance.

To which conclusion of law the defendants duly excepted.

4th. That the defendants were not justified in attempting to withdraw their offer, or in selling the dollars when they did.

To which conclusion of law the defendants duly excepted.

5th. That it was the duty of the telegraph company employed by the plaintiffs on the 31st day of January, 1860, or promptly thereafter, to have notified the office in New York of the break in the line at Canton, and then for the office in New York to have promptly notified the plaintiffs of the same facts; and that it was negligence in the company to delay giving this notice until the 4th day of February.

6th. That the plaintiffs are not responsible for the negligence of said company.

To which conclusion of law the defendants duly excepted.

7th. That as between the plaintiffs and defendants in this action, the plaintiffs were not guilty of negligence in not inquiring at the office in New York before the 3d February, and on ascertaining that the interior line was down, sending the telegram by the other line.

To which conclusion of law the defendants duly excepted.

8th. That the plaintiffs were not guilty of negligence in not having their telegrams and acceptance repeated.

To which conclusion of law the defendants duly excepted.

9th. That the telegram of the defendants of February

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3d, notifying the plaintiffs that the dollars were sold, did not operate as a withdrawal of said offer.

To which conclusion of law the defendants duly excepted.

10th. That there was a sufficient contract, notwithstanding the statute of frauds.

To which conclusion of law the defendants duly excepted.

11th. That upon the facts in this case the defendants were bound to fulfill the contract, and to pay the plaintiffs their damages for the non-fulfillment of the same.

To which conclusion of law the defendants duly excepted.

12th, That the plaintiffs are entitled to judgment for such damages, amounting to \$219.33, and to their costs to be adjusted.

To which conclusion of law the defendants duly excepted.

Ira D. WARREN, counsel for appellants.

I. The referee erred in finding as a fact, "that it is not usual to have telegrams repeated." All the evidence upon that subject is the other way.

II. The referee erred in finding, as a conclusion of law, that the contract was completed on the same day that the plaintiffs' acceptance of defendants' offer began to be transmitted to the defendants, and that it was not necessary that the defendants should actually receive the message of acceptance to make a binding contract.

1. The plaintiffs, then, must rely wholly upon the assumption that communications by telegraph, between contracting or negotiating parties, are governed by the rule laid down in the cases of *Maetier agt. Frith*, and *Vassar agt. Camp*, in reference to negotiations by mail.

It is submitted that, as the question is new, this court

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will not establish such a rule in relation to communications by telegraph, unless it be supported by clear analogy, or by conclusive reasons founded upon justice and public policy, and that it is supported by neither.

2. When the rule in reference to mail communications was first established in this state, it required every argument in its favor to support it.

And it is submitted that it must soon be modified here in cases where the parties have also telegraphic facilities, or business men will cease to use the mail for business purposes.

3. There is no more reason why this rule should be applied to a telegraphic message than to a message sent by a private messenger, or by an express company. In case of mail, the medium of communication is not responsible to, or under the control of either party, and is the agent of neither. In the language of SELDEN, J., in *Vassar agt. Camp*, "He (the person depositing in the post-office) can do nothing more to insure the safe delivery, and is not responsible for its miscarriage." The telegraph is controlled and managed by private persons or corporations. Its owners receive compensation, and are liable for errors and failures in the same way as individuals.

4. In this case there were two distinct lines. The plaintiffs had a choice of messengers. There is no such choice in case of mail.

5. The person depositing a letter in the post-office cannot know that it will be received in due course of mail, and he necessarily acts upon the faith that it *will*. Not so with the telegram. By repeating he can be assured of its delivery, or ascertain its failure.

6. The referee has found that the damage was occasioned by the negligence of the national telegraph company, employed by the plaintiffs. Whether agent of the plaintiffs or not, it is responsible to them for damages occasioned by its negligence in their employment. (*Sedg.*

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on Damages, 62, 63; *Bryant* agt. *American Telegraph Company*, Transcript, March 14, 1862; *N. Y. &c. Tel. Co.* agt. *Dogbury*, 35 *Penn. State R.* 298; *W. & C. Tel. Co.* agt. *Hobson*, 15 *Gratt. Va.* 122; *Parks, &c.* agt. *Alton, &c. Tel. Co.* 13 *Cal.* 422; *Camp* agt. *Western Telegraph Co.* 1 *Met. Ky.* 184.)

It is not responsible to the defendants, as there was no contract between them. The rule, contended for by the plaintiffs would charge an innocent party, who has no remedy, with damages to—if you please—an equally innocent party, but who has complete remedy against the one properly chargeable. No legal proposition can be established which ever produces such absurd consequences. The rule is well established that whenever one of two innocent parties must suffer by the act of a third, he who has enabled the third party to do, or occasion the injury, must sustain the loss. (*Downs* agt. *Greene*, 24 *N. Y.* 645.)

The ruling of the general term, in reversing the former judgment, may, perhaps, be reconciled with the common sense of the case, by leaving the parties to the law governing contracts in ordinary cases, viz: that the acceptance must be communicated within a reasonable time, to the party to be charged, or his authorized agent. Each retaining any remedy they may have against third parties in case of accident or neglect.

(a). The rule, in the case of the mail, is founded upon other considerations than the mere fact that the post-office department is not held to be the agent of either party; in fact the absence of the relation of principal and agent, between the party depositing the acceptance, and the mail which carries it, seems scarcely to have entered into the reasoning of the cases, and the considerations which controlled the court in adopting that rule do not apply to telegraphic communications as shown above.

(b). A party is chargeable with all the information he might have obtained by reasonable diligence. He knew, or

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should have known, that this telegraph was down and that another line was running.

Suppose a party knew that, by reason of an insurrection, the mails were entirely stopped, would a deposit in the post-office of an acceptance bind the other? Clearly not, but were there a telegraph line working, which he might use, the case would be stronger. Then, should the offerer withdraw his offer before the mails started, would any reason remain for holding a contract completed?

7. Suppose the defendants had not received the telegram of acceptance until February 5th, and had sold their dollars when the steamer sailed, or had the plaintiffs deposited their telegram when they knew both lines were down, would defendants have been liable? If not, then there is no such rule, and the only question is, whether the defendants waited a reasonable time. The referee has found that they did.

8. The plaintiffs might have withdrawn their message of acceptance on the 2d, before it was actually transmitted, and they would not have been bound by it.

Had it been a letter sent by mail, they could not have done it. If the contract is not binding on one party, it should not be on the other.

III. The defendants waited more than a reasonable time. The message contained the word "answer," which meant answer at once; and they waited four days for what should have reached them in one day at furthest. (*Story on Contracts*, §§ 380, 344, and 388.)

(a). "The plaintiffs had a right to withdraw their offer, and did so on the 3d February, and before the acceptance reached them." (*Payne agt. Cave*, 3 *Term R.* 148; *Parsons on Contract*, vol. 1, p. 399 to 408, and cases cited; *3 Cushing*, 234.)

The referee erred in finding that the telegram of February 3d did not amount to a withdrawal.

IV. The plaintiffs were guilty of negligence. They knew

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that by repeating their telegram they could ascertain whether it went through or not, and if not, could send it by the other line; or, if both failed, by knowing it they would avoid entering into engagements resulting in damage. They cannot recover of the defendants damages, which their own negligence, in any way, contributed to produce, or which were caused by the negligence of the medium of communication they employed to transmit their message. There was no arrangement between the parties to employ this particular company. There were two companies.

V. There was a condition attached to the offer. The word "answer," on defendants' telegram, was equivalent to saying, "we must receive an answer at once, to make this binding." The plaintiffs' theory, and the only one upon which this case can stand, that the company being the agent of no one, and not responsible for its acts, its acts or omissions do not affect the rights of the parties. The non-reception of this word by plaintiffs does not alter its effect. The condition was not complied with and no contract was made.

VI. The plaintiffs did not prepay the telegraph company's charge upon their messages of acceptance. The defendants might properly have refused to receive a communication so encumbered, and such a message cannot be considered as delivered for the purpose of binding a party who could only know its contents by paying a charge which the plaintiffs themselves should have paid.

VII. The real responsibility is with the national telegraph company, where the referee places it. The fault was theirs, and they are liable to damages to the plaintiffs who employed them. If the plaintiffs should recover of the defendants, the latter would be remediless, as there was no privity of contract between them and that company.

VIII. Communications by telegraph are not such memo-

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randa in writing as to take the case out of the statute of frauds.

1. There is no evidence that the defendants left a copy of the dispatch of 31st January at the office in New Orleans, signed by them, or that such a writing, so signed, was delivered to the plaintiffs.

2. If it be answered that the defendants made the telegraph company their agent to sign and deliver such a memorandum in writing, the fact of the agency overturns the only theory upon which the plaintiffs' case can stand.

IX. The judgment should be reversed.

GEORGE R. THOMPSON, *counsel for respondents.*

I. There was a valid contract made between the parties.

(a). The offer of Wood & Co. was distinctly to deliver to plaintiffs, by the steamer Moses Taylor, which was understood to sail, and did sail from New Orleans to New York on the 5th of February, 1860, certain dollars, at a certain price. This was an offer continuing and binding upon the defendants up to the time the steamer sailed, unless withdrawn previous to its acceptance, and they were bound to hold the dollars at the disposal of the plaintiffs until that time, whether the offer was accepted or not. The proposer may, and has, in this case, determined how long the offer shall continue. "If the proposer receives the assent to it before retracting his offer, he is bound by it." (*Parsons on Contracts*, 405, vol. 1; *Boston and Maine R. R. agt. Bartlett*, 3 *Cush.* 224; *see Cases cited in notes to Parsons on Contracts*, vol. 1, book 2, ch. 2, pp. 404-8.)

(b). If it be considered that defendants were only bound to wait a reasonable time before disposing of the dollars offered, then that reasonable time is, in this case, to be determined by the sailing of the steamer, if she sailed at the

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time the defendants supposed she was to sail, when they forwarded the offer.

If the proposer fixes a time, he expresses his intention, and the other party knows exactly what it is. If no definite time is stated, then the inquiry is as to what time it is natural to suppose the parties contemplated. The intention is to be gathered from the offer itself, and from the attendant circumstances. There can be no doubt from the offer itself, but that the defendants meant to make the offer continuing until the sailing of the steamer. The steamer was to sail in a few days; the defendants knew it; they offered to send the dollars then if desired, and they were bound to wait until that time before they put it out of their power so to do.

The offer did not relate to any particular dollars then in their possession. It does not appear whether they had these dollars on hand, or proposed to procure them elsewhere. It would have been no answer to this action that Wood & Co. expected to be able to procure the dollars, and afterwards found themselves unable to do so. Is it not reasonable to suppose that the plaintiffs thought that they could accept the dollars at any time previous to the sailing of the steamer? The offer is susceptible of no other construction. Three, or four or five days was not an unreasonable time to wait, in any event. The defendants themselves did not exercise due diligence.

(c). The offer was accepted by telegraph the same day it was made, again the next day, and also by letter, properly mailed, the same day. All these different acceptances reached the defendants the day before the sailing of the steamer.

II. Either of these acceptances concluded the contract the moment either were put in a proper way of being communicated to defendants.

And the referee under the decision of this court at gen-

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eral term made no error, in disregarding the question of negligence.

(a). The question is, was there a contract? The definition of a contract is the agreement or meeting of minds for the consummation of any particular object. It has been decided by the court of last resort in this state, in broad terms, that if a proposer makes his offer by mail, and that offer is accepted, before notice of its withdrawal, by depositing an acceptance in the post-office properly addressed to the proposer, that at that moment the contract is complete, and it makes no kind of difference whether the proposer ever receives the acceptance, or ever hears of it, or not. (*Vassar* agt. *Camp*, 1 *Kern.* 441; *Mactier* agt. *Frith*, 6 *Wend.* 103; *Adams* agt. *Lindsell*,⁶ 1 *Barn.* & *Ald.* 681.)

In the case in *Wendell*, the court say: "Where the offer is by letter, the usual mode of acceptance is by sending a letter announcing a consent to accept; where it is made by a messenger, a determination to accept, returned through him or sent by another, would seem to be all the law requires. There are other modes equally conclusive upon the parties; keeping silence under certain circumstances is an assent to a proposition; anything that shall amount to a manifestation of a formed determination to accept, communicated or put in a proper way to be communicated, to the party making the offer, would doubtless complete the contract. The knowledge of the party making the offer of the determination of the party receiving it, is no ingredient of an acceptance."

III. If this is law, then we insist there is a contract in this case.

(a). The only question is as to whether there is any difference between the telegraph and the mail, or whether the privilege does not equally apply to the telegraph as to the mail.

The reason why the contract is considered binding in

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the case of the mail is, that the minds of the parties having met, the contract is rendered complete at once. The non-liability of the government for the neglect of the officials at the post-office is not the reason. Post-office officials are not liable for neglect, and the difficulty of tracing the neglect to its source, or the lack of responsibility of any postmaster is not a reason for the doctrine as established. (*Whitfield* agt. *Lord de Spencer, Couper*, 754, 765; *Teal* agt. *Felton, 1 Comstock*, 536.)

There is then no real difference between the mail and the telegraph in this respect. And the decisions do not put the case of the mail upon any such ground. The ground is the absolute completion of the contract; not that as you cannot sue the post-office, therefore you may sue the party.

IV. If the offer was not accepted by telegraph, it was by mail.

V. If these views are correct, then certainly the question of the negligence of the telegraph company had nothing whatever to do with the case, and the referee did not err in deciding that the plaintiffs are not responsible for the neglect of the telegraph company.

(a). There was no neglect on the part of the plaintiffs; their failure to repeat their messages is of no consequence. It is not usual to do so, nor was it incumbent upon them.

VI. The testimony on the question of negligence was inadmissible for another reason. In order to show it, it was necessary that the answer should allege it. It contains nothing of that sort. (*McKyring* agt. *Bull*, 18 N. Y., 297.)

VII. On the hearing of the former appeal in this case the court decided that the telegraph company was not the agent of the plaintiffs, and that therefore they are not responsible for its negligence.

This decision is evidently correct, especially in view of the fact that there was an arrangement between the parties

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to correspond by telegraph in relation to business, and this contract was made in pursuance of that arrangement.

And the subsequent ruling of the referee granting the judgment appealed from by this appeal was a matter of course.

VIII. It is evident that this contract was not void under the statute of frauds.

(a). It is proved beyond question that the defendants sent an offer. This they subscribed before they sent it and do not deny it. It was not necessary to produce the original telegram. The contract was confirmed by a letter which was produced and which was signed by defendants.

IX. The judgment should be affirmed.

By the court, LEONARD, J. There was never any *aggregatio mentium*, or meeting of the minds of the parties in respect to the purchase and sale of the dollars in question.

The plaintiffs failed to notify the defendants of the acceptance of their offer until after the defendants had countermanded or recalled it.

The plaintiffs must be regarded as having undertaken on their part to bring to the defendants the knowledge of their acceptance or refusal of the offer made. The parties had agreed beforehand that their communications should be made by telegraph.

This was in effect a warranty by each party that his communication to the other should be received.

It cannot be supposed that the party who was to receive the communication was willing to incur the hazard of a safe delivery of the messages of the other party with whom he was in treaty through the medium of the telegraph. The communication is only initiated when it is delivered to the telegraph operator. It is completed when

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it comes to the possession of the party for whom it is designed.

We think that the rule that has been established by the courts in respect to contracts made by letter sent through the mail is not applicable to communications by telegraph. (*Mactier agt. Frith*, 6 *Wend.* 103; *Vassar agt. Camp*, 1 *Kernan*, 446.)

The public post-office is governed by no private interests. The officers who direct its operation are regulated by law, and its violation is punishable criminally.

The operators of the telegraph are appointed or employed by private enterprise, and are responsible to those who employ them for the proper performance of their service.

There are also other distinctions. The telegraph companies have been conducted, so far as has come to my knowledge, with great fidelity and integrity, but an institution of that kind cannot, while conducted by private enterprise, be so clothed with a public official character as to make the receipt of a communication at the office of the telegraph company of the same effect in relation to the acceptance of an offer by a contracting party as the actual delivery of it would have.

The judgment should be reversed and a new trial had before the same referee. The costs of the appeal to the appellant to abide the event.

Kolls agt. De Leyer.

SUPREME COURT.

BENEDIX KOLLS agt. MARGARETTA DE LEVER, impleaded, &c.

An action against a *married woman* will lie to charge her separate estate with *damages* which have resulted from her *breach of covenants of warranty* in conveying real estate owned by her.

Second District, Brooklyn General Term, March, 1864.

BROWN, LOTT and SCRUGHAM, Justices.

APPEAL by defendant from an order overruling demurrer to plaintiff's complaint.

GEORGE H. FISHER, for plaintiff.

I. Although twenty-one objections are specified in the demurrer, it is believed that there are not so many points in the case, and, indeed, but one point of consequence.

II. It appears from the complaint, that the defendant, Margaretta, wife of the defendant, Anthony, being possessed of a separate estate, conveys a portion of that estate to the plaintiff, by a full covenant warranty deed, in which deed her husband unites, so far as to convey his interest, if any he has, but in which the covenants of warranty are made by her alone.

It appears that she is conveying a portion of her separate estate, because the complaint alleges that the property conveyed is her separate estate, and it further alleges that at the commencement of the action she is still possessed of a separate estate.

III. It further appears that at the time of the conveyance, taxes were unpaid, in breach of the warranty, and that such taxes continued unpaid, and were finally paid by the plaintiff. Action brought to recover the amount so paid, as a charge on her remaining separate estate.

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IV. The only question of importance is, whether, under the circumstances stated, an action lies to charge the remaining separate estate of the defendant, a married woman, with the damages which have resulted from the breach of warranty.

The cases and the law are summed up in *Yale agt. Deaderer* (8 *Smith, N. Y. R.* 450), and the result may be stated in language used by the court of appeals in the decision of that case, viz :

"In order to create a charge, &c., on estate of married women, the intention to do so must be declared in the contract, or the consideration must be obtained for the direct benefit of the estate itself."

1. In this case the contract is the warranty contained in the deed. The consideration was the consideration expressed in the deed.

It is submitted that no possible consideration could move more directly to the estate, for its benefit, than a consideration paid to the grantor, for a conveyance of a portion of that estate.

The court will not inquire in such a case, whether the sale was, on the whole, a favorable one for the estate. The "benefit to the estate" spoken of, is a technical expression, having reference to the connection of the transaction with the estate, and not to the nature of the transaction, whether favorable for the estate or otherwise.

Moreover, in a transaction, fair on its face, in which there is no suggestion of fraud, illegality, or attempt of any kind to impose upon, or take advantage of one side or the other, the court will presume that the transaction was mutually beneficial.

V. It is further observable that this incumbrance was a tax; and it does not admit of doubt, that the payment of a tax, lawfully imposed on an estate, or a portion of an estate, is for the benefit of that estate generally, or for the benefit of the whole estate.

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VI. It is settled that the joinder of a defendant more than is necessary, does not justify a demurrer.

The "defect of parties" spoken of in the Code, is a deficiency of parties. (*Peabody agt. Wash. Ins. Co.* 20 Barb. 339: 8 *How.* 389; 17 *N. Y. R.* 592; 12 *How.* 134; *id.* 17; 14 *How.* 517; 16 *How.* 325.)

VII. If it be objected that the complaint is not sufficiently definite and certain to lay the foundation for a judgment, a motion for that object would be proper, and not a demurrer.

F. BYRNE, for defendant.

By the court, Baown, Justice. This is a demurrer to the plaintiff's complaint. The causes of demurrer are very numerous, and all of them, but one, very frivolous.

The defendant is a married woman, having a separate estate of her own.

Prior to the 1st day of February, 1858, and since the passage of the acts in regard to married women, and giving them the right to acquire, hold, use, grant and convey real property the same as *femes sole*, she acquired by purchase a lot of ground in the twelfth ward in the city of Brooklyn, the title to which she held in fee in her own right. On the 15th day of February, in the same year, being so seized of the said lot of ground, she conveyed the same to the plaintiff, by the usual deed of conveyance with covenants of seizin, and that the same were free from incumbrances of every description. There has been a breach of the last of these covenants; the estate at the time being incumbered with certain taxes, which the grantee (the plaintiff) has been compelled to pay to save the estate from sale, &c. All these facts appear by the complaint.

The question raised by the demurrer is, whether the duty, debt or obligation created by the covenants in the deed,

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were directly beneficial to the estate of the grantor. This cannot be a debatable point. It is too plain, I think, for argument. The obvious effect of the covenants in a deed of conveyance, is to assure the title and enlarge the purchase money. No one doubts that the reason why the grantee demands and the grantor makes these covenants is, to afford the former a complete indemnity to the extent of the purchase money should the title fail.

This duty assumed by the grantor under the contract, may be, and often is, the principal inducement to the purchase. It enlarges the purchase money, and thus to an extent, more or less, is clearly for the benefit of the estate of the grantor. It may be said, although the remark is not necessary to the decision of the demurrer, that covenants of warranty, seizin, quiet enjoyment, are incident to and usually attend upon conveyances of real estate, and in the absence of all limitation and restraint upon the power of a married woman, the legislature, when conferring the right to acquire, use, grant, devise and convey real property in the same manner as *femes sole*, must have intended conveyances in the usual manner and with the usual covenants to assure the title.

The order overruling the demurrer should be affirmed, with costs.

SUPREME COURT.

MARY ANN GREER agt. MARGARET S. SANKSTON and others.

An *alien widow* cannot be endowed of lands of her husband, who was a naturalized citizen of the United States at the time of his death, where the marriage took place prior to the act of the legislature of this state passed April 30, 1, 1845, when both husband and wife were *aliens*, and the widow never having been a resident of this country.

Greer agt. Sankston.

New York General Term, May, 1858.
Before DAVIES, P. J., INGRAHAM and SUTHERLAND, Justices.
APPEAL from a judgment at special term.

E. F. BROWN, for plaintiff.

B. F. DUNNING, for defendant Sankston.

SCHELL, SLOSSON and HUTCHINS, for North River Insurance Company.

By the court, INGRAHAM, J. The title to the premises sold under the judgment in this action is objected to on the ground that the widow of Henry Sankston, the father of the plaintiff, is entitled to dower therein, and therefore the title to the premises is defective.

Sankston was married in 1829 to Ann McConnell in Ireland, where they both resided, and were citizens of that country. The husband came to this country in 1831, and has resided since that time until his death here. He was naturalized in 1836, and he purchased the property in question in 1843. His widow has continued to reside in Ireland until this time. Sankston died in 1854.

There can be no doubt that prior to the act of 1845 an alien widow could not be endowed of land of her husband, whether a citizen or not. (*Connolly agt. Smith, 21 Wend. 59.*)

Unless that act has changed the law on this subject, she still remains incapable of being endowed.

By the second section of that act provision is made for the wife of an alien resident of the state, who had died before the passage of the act, and the wife of any alien so resident, who should thereafter purchase any lands, giving to her dower therein.

The third section allows any woman being an alien, who had, before the passage of the act, or who should after that time marry a citizen of the United States, to have dower in his lands.

The second section clearly does not apply to this case.

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The third section describes two cases, one of a woman, who shall thereafter marry a citizen, and the other of a woman who had before the act married a citizen of the United States.

The first case in this section is also inapplicable, and the only question remaining is whether Mrs. Sankston married a citizen of the United States before 1845.

I can see no ground upon which she could be brought within the provisions of that section. At the time of the marriage they were both aliens, residing in Ireland, and never having been in this country. He was not then a citizen, and she could not be said to have married a citizen prior to 1845.

It is evident from the whole of the section, that the intent of the legislature in passing this section was to provide for the cases of citizens who had married alien wives, either before or after the passage of the act, in the same manner as they had in the second section provided for the widows and wives of resident aliens who could hold real estate.

The cases of widows of aliens naturalized after their marriage, and the wives of non-resident aliens, are not provided for under the statute.

There seems to be no good reason for the distinction, and the same rights in regard to dower might as well have been given to the latter as to the former. But it is not for the courts to legislate, and we can only consider this a "*casus omissus*," which can only be supplied by subsequent legislation.

We are of opinion, that the widow of Sankston has no right to dower in the lands of her husband, and that the order appealed from should be affirmed.

Burton agt. Burton.

NEW YORK COMMON PLEAS.

ELIZABETH BURTON agt. CECILIA BURTON, and JOHN J. CRANE, ex'trs, &c., of WILLIAM E. BURTON, deceased.

"Any woman being an alien who has heretofore married or who may hereafter marry a citizen of the United States, shall be entitled to dower in the real estate of her husband, within this state, as if she were a citizen of the United States." (Laws 1845, ch. 115, § 3.)

"Any woman who might lawfully be naturalized under the existing laws, married or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen of the United States." (Act of Congress Feb. 10, 1855, 10 Stat. at Large, p. 604, § 2.)

Where the plaintiff, an alien widow, having married an alien prior to the passage of the act of the legislature in 1845, and never having resided in this country prior to her husband's death, *held*, that she had no *dower right* in the lands of which her husband died seized as a citizen of the United States.

Held, also that the act of Congress of 1855, was designed for the benefit of an alien white woman, whether resident or not, married to a person who was *at the time of the marriage a citizen of the United States*. But if construed with liberality, it would only extend to an alien woman resident in this country, though married abroad to an alien, and who came to this country with him or followed him here, and in that way, or in one of these ways identified herself with the country of his adoption.

New York Special Term, March, 1864.

THE plaintiff by this action seeks to have her dower ad-measured in the lands whereof William E. Burton died seized in Hudson street, in the city of New York, whereon Burton erected his residence, and in which he died. She alleges in her complaint that the plaintiff and William E. Burton were married at the church of the parish of St. Martin-in-the-Fields, county of Middlesex, England, on the 10th day of April, 1823, and to bring the case within the acts of congress in relation to the naturalization of aliens, she having until after Burton's death remained in England, embracing in her complaint the following allegation:

"That she then was, and ever since hath been and is a free white woman."

She further alleges that William E. Burton died seized and possessed of the property described in the complaint,

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on the 10th day of February, 1860, having devised the same to the defendants in fee.

The defendants, by their answer, denied the marriage, and as a second defence set up the naturalization of Burton on the 8th day of October, 1840, in Pennsylvania ; that the plaintiff was an alien, having, ever since the pretended marriage, been, and, still being, a subject of Great Britain ; and, therefore, not entitled to dower in the lands of the testator.

To this second defence the plaintiff demurred, and the matter came up for hearing on this demurrer.

CHARLES O'CONOR and B. F. DUNNING, for plaintiff.
EDMUND R. ROBINSON, for defendants.

The counsel for the plaintiff argued that Burton, being a citizen of the United States on the 10th day of February, 1855, the plaintiff, as his wife, by force of the act of congress passed on that day, also became a citizen of the United States ; that nothing in the act of 1802 could be construed as requiring an actual residence here ; that by construction of law the plaintiff's residence at the time of the passage of the act was the same as that of her husband. He further claimed that, under the act of the legislature of this state, passed April 30, 1845, the plaintiff was entitled to recover the dower she sought.

The counsel for the defendants urged that the rule of the common law, that an alien was not entitled to be endowed of lands of her husband, whether he was a citizen or not, governed the case. That the plaintiff did not come within the act of congress of 1855, because until after the death of Burton, she never resided or came within the United States.

BRADY, J. In this case a question is presented, for the first time, which involves a construction of the second

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section of the act of Congress, passed on the 10th February, 1855, which is as follows :

“Any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen of the United States.” (10 *Statutes at Large*, p. 604, § 2; *Brightley's Digest*, p. 132, § 2.)

The plaintiff was the wife of William E. Burton, now deceased. They were both born in the United Kingdom of Great Britain and Ireland. After their marriage, Mr. Burton came to this country and continued to be a resident thereof until his death. He was duly naturalized in the year 1840. The plaintiff continued to be a resident of her native land until after the death of her husband, when she came to this country, and in this action, under and by virtue of the act of congress referred to, claims a right of dower in the lands of which he died seized. The difficulties which present themselves in this case arise from the ambiguity of the section which has been recited. What is meant by the words “any woman who might lawfully be naturalized under the existing laws, married to a citizen of the United States?” The rest of the section is free from obscurity. The language employed by the law givers would seem to extend the rights of citizenship to every woman married to a citizen of the United States, whether such marriage took place before or after the husband became a citizen, and whether the wife was or was not a resident of this country, either at the time of the marriage or subsequently.

Did the congress of the United States, enacting this law, intend that it should have such an effect? We must, as suggested by Chief Justice TANEY, gather their intention from the language used, comparing it, where ambiguity exists, with the laws upon the same subject, and looking, if necessary, to the public history of the times in which it was passed (*Aldridge agt. Williams*, 3 *How. U. S. R.* 24),

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and adopting that suggested as a guide, a conclusion may be drawn, which will remove the doubts and reveal the design of the act under consideration. The act itself was framed (see section first) in reference to the issue of citizens of this country born abroad.

Necessity for legislation on that subject undoubtedly provoked it. A very able review by Mr. Horace Binney of the acts of congress in force on that subject and of the various attempts to remedy the existing legal defects will be found in the second volume of the *American Law Register (Phil.)* p. 193, and I entertain the belief that the review mentioned contributed much to the enactment of the law. It will not be necessary for the determination of the question involved in this case, however, to consider in detail the whole scope of legislation upon the subject of citizenship of children born abroad whose parents were or whose father was a citizen of the United States, but to refer to it as incidental to the question on hand, the two subjects embraced in the act of 1855 being kindred to and growing out of each other. It will be sufficient, therefore, in relation to the subject embraced in the first section of the act of 1855 to say that under the then existing laws the child of a citizen of the United States born abroad was an alien, and that even under the act of congress passed in 1802 (*Brightley's Digest*, p. 35) the child of an alien mother born abroad was an alien although the father was in fact a citizen. Some attempts were made in congress to remedy this, and bills were introduced for that purpose. One reported by Mr. Wall in 1841, another introduced by Mr. Webster in 1848, and still another by Mr. Bradbury in 1852.

None of these bills were passed, however—they were unlike in phraseology or dissimilar in scope. The bill reported by Mr. Wall contained no express provision in reference to women. The bill of Mr. Webster provided that the children of citizens of the United States born out of

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the limits of the United States should be considered as citizens of the United States, and also by the second section, "that every woman married, or who should be married to a citizen of the United States, and should continue to reside therein, should be deemed and taken to be a citizen of the United States." The bill introduced by Mr. Bradbury was precisely the same as Mr. Webster's; but the judiciary committee recommended that the second section should be stricken out. (*Review of Mr. Binney, supra; see, also, Congressional Globe, and Appendix, Second Session, Twenty-sixth Congress, pp. 181-212; Congressional Globe, First Session, Thirtieth Congress, p. 834—Mr. Webster's remarks, and p. 844, his bill; Congressional Globe, Part Second, Twenty-fourth volume, First Session, Thirty-second Congress, pp. 991-1352.*) It will thus be seen that legislation in congress, so far as it extended to alien wives prior to the year 1855, contemplated a continued residence by them in this country, which was the effect of the provision in Mr. Webster's bill, and, as we have seen, the judiciary committee, at a subsequent period recommended that even the grant of that privilege should be discountenanced. The conditional qualification of continued residence by the wife may have been regarded as objectionable, because it was not imposed upon the husband, and his civil condition might continue, while hers would change.

But whether that was so or not, no substitute was suggested for that section by the committee. The assault upon it was sweeping. The act of 1855, therefore, as we glean from this previous legislation, though unfinished, the history of the legislative object to be attained by it, and as well the general considerations which influenced nations in framing naturalization laws, was designed, certainly, for the benefit of an alien white woman, whether resident or not, married to a person who was at the time of the marriage a citizen of the United States, thus securing, by the same law, the rights of citizenship to the children of

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American citizens born abroad, and to such alien wife all legal rights of citizenship, which otherwise, and by reason of her alienism, she might not possess. (*See opinion of Judge Ingraham in case of Greer agt. Sankston, decided in the supreme court, first district, adopting a like construction upon similar phraseology in a kindred case.**)

This was, in my judgment, the primary object of the act if it be not the full scope of its intent. It was a legislative measure passed in reference to citizens of the United States, and bearing upon such marital relations with alien women as they might establish. Construed with liberality, however, it might be held, also, to extend to an alien woman resident in this country, though married abroad to an alien, and who came to this country with him or followed him here, and in that way, or in one of these ways, identified herself with the country of his adoption. Such a construction would produce an effect analogous to that of the statute which confers citizenship upon the alien minor children, dwelling in the United States, of a person who becomes a citizen. (*Act, Brightley's Digest*, p. 35, § 3.)

In this case, the plaintiff has neither sought to derive the benefit of her husband's naturalization by coming with or following him here, nor entitled herself to the benefit of a liberal construction in her favor of the act, as suggested, by a residence in this country of any duration prior to her husband's death. Her rights, therefore, as a citizen, depend entirely upon the construction of the section of the statute under consideration, and I am of the opinion that she has no claim upon her husband's estate thereunder. He was not, when he married her, a citizen of the United States, and she was never a resident thereof during his life. On the contrary, she was and continued to be both alien and stranger.

*Reported ante, p. 471.

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The plaintiff being an alien, and having married an alien, and not having resided in this country prior to her husband's death, has no dower right in the lands of which her husband died seized, under the provisions of the act of the legislature, passed in 1845, (*Session Laws 1845*, p. 94.)

The precise point has been decided in the case of *Greer agt. Sankston, supra*. For these reasons, I think the defendants entitled to judgment upon the demurrer.

Ordered accordingly.

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COURT OF APPEALS.

WHITE, receiver, &c., agt. MADISON.

Whenever a person enters into a contract as *agent* for another, he warrants his own authority as *agent*, unless very special circumstances, or an express agreement, relieve him from that responsibility.

Where one pretending to be an *agent* has contracted as such without authority from the principal, the party contracted with, on learning the facts, has the right to *repudiate the contract* and hold the assumed *agent* immediately responsible for damages upon his *warranty*, without waiting for the time when an action might be maintained on the contract itself.

The damages in such a case are measured not by the contract, but by the injury resulting from the agent's want of power.

If *special damages* should be incurred in consequence of the agent's failure to bind his principal, such as the costs of an unsuccessful action against the principal to enforce the contract, they might be recovered.

If the act of the agent be *fraudulent*, an action for the deceit would lie, but it would be a concurrent remedy with the action on the *warranty*.

It is competent to show by *parol* the grounds on which a verdict or judgment was rendered, when the grounds become material and do not appear on the record.

A *sheriff* by a seizure of goods on *attachment*, acquires such a special property as gives him an *insurable interest* in the goods.

And where the sheriff has authority to insure such goods, his *deputy* who seized them, might insure them in the name of the sheriff; but this power does not authorise the deputy to give a *premium note* in the name of the sheriff, and thus subject the sheriff to the hazards of that most unsafe of partnerships, a *mutual insurance company*.

Albany, September Term, 1863.

APPEAL from a judgment of the supreme court.

This action was brought by the receiver of an insurance company, to recover the amount due on a *premium note* made by the defendant in the name of one Snow, and which note was signed, N. D. Snow, sheriff of Chautauque county, by A. Z. Madison, dep. shef. The defendant, at the time of the execution of the note, was the deputy of said Snow, who was then the sheriff of Chautauque county, and as such deputy had seized goods in *transitu* from New York to Indiana on attachment, and at the same time being agent of said insurance company, caused said goods to be

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insured for one year in said company, assuming to act throughout and executing all the papers as deputy sheriff, signing the name and office of the sheriff, by A. Z. Madison, deputy sheriff. The company issued the policy upon no other consideration than the said note and the advance premium.

The complaint, among other things, set forth the proceedings in an unsuccessful suit against said Snow on said note, and demanded judgment for the costs of that suit, together with the full amount of the note, and claimed that the assessments for losses were equal to that amount.

The judge at the circuit ordered judgment for the plaintiff, and the supreme court, at general term, affirmed that judgment, from which judgment at general term an appeal was had to the court of appeals.

HENRY R. MYGATT, for the plaintiff.

JOHN WAIT, for the defendant.

By the court, HENRY R. SELDEN, J. It was proved, on the trial in this case, that the defendant on the trial of the former action against the sheriff, testified that he had no authority from the sheriff to execute in his name the note mentioned in the complaint, unless that authority was within his general powers as a deputy of the sheriff; and the counsel on both sides have assumed that he had, as deputy, no such authority. It seems also to have been assumed that the sheriff had no power to insure, in his official capacity, the goods attached, and that consequently the deputy could not insure them in his name. The question of power on the part of the deputy to execute the note in the name of the sheriff does not depend upon that position.

If the deputy had power to insure in the name of the sheriff, he could not, in effecting such insurance, subject the sheriff to the hazards of that most unsafe of partner-

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ships, a mutual insurance company. He may have had power to insure the sheriff's goods, without having power to make him the insurer of other people's goods. The latter power was attempted to be exercised when he made the note in question, and this was undoubtedly beyond his general authority.

The defendant having executed the note in the name of Snow, without authority, would be held liable, according to several decisions in this state, as the maker of the note. (*Dusenbury* agt. *Ellis*, 3 *Johns. Cases*, 70; *Feeter* agt. *Heath*, 11 *Wend.* 478; *White* agt. *Skinner*, 13 *Johns.* 307; *Rossiter* agt. *Rossiter*, 8 *Wend.* 494; *Meech* agt. *Smith*, 7 *id.* 315; *Palmer* agt. *Stephens*, 1 *Denio*, 480; *Plumb* agt. *Milk*, 10 *Barb.* 74.) The authority of these cases has been somewhat shaken by the remarks of the judges who delivered opinions in the case of *Walker* agt. *The Bank of the State of New York* (5 *Selden*, 582); and in England, as well as in several of the United States, the principle upon which they rest, if they are supposed to present the only ground of liability of the agent, has been substantially repudiated. (*Collen* agt. *Wright*, 40 *Eng. L. & E.* 182; *Randell* agt. *Trimen*, 37 *id.* 275; *Lewis* agt. *Nicholson*, 12 *id.* 430; *Smout* agt. *Ilbery*, 10 *M. & W.* 1; *Polhill* agt. *Walter*, 3 *B. & Ad.* 114; *Jenkins* agt. *Hutchinson*, 13 *Ad. & Ellis, N. S.* 744; *Long* agt. *Colburn*, 11 *Mass.* 96; *Ballou* agt. *Talbot*, 16 *id.* 461; *Jefis* agt. *York*, 4 *Cush.* 371; *S. C.* 10 *id.* 392; *Abbey* agt. *Chase*, 6 *id.* 54; *Stetson* agt. *Patten, Greenl.* 359; *Bank* agt. *Flanders*, 4 *N. H.* 239; *Woodes* agt. *Dennett*, 9 *id.* 55; *Johnson* agt. *Smith*, 21 *Conn.* 627; *Ogden* agt. *Raymond*, 22 *id.* 379; *Taylor* agt. *Shelton*, 30 *id.* 122; *Hopkins* agt. *Mchaffy*, 11 *S. & R.* 126; 2 *Smith's Leading Cases*, 222; *Story on Agency*, § 264 a, and note 1.)

If it were necessary in disposing of the present case, to decide the question whether, as a general principle, one entering into a contract in the name of another, without authority, is to be himself holden as a party to the contract;

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I should hesitate to affirm such a principle. By that rule, courts would often make contracts for parties, which neither intended, or would have consented to make. The contract, if binding upon one party, must be binding upon both, and where burdensome conditions precedent were to be performed by the party contracting with the assumed agent, before performance could be demanded of the other party, or where the agent should undertake to sell, lease, or mortgage the property of the assumed principal, or where credit should be given, which the responsibility of the agent would not justify, great injustice might result from such a rule. In those cases, and I think in all cases where one pretending to be an agent has contracted as such without authority from the principal, the party contracted with, on learning the facts, must have the right to repudiate the contract, and to hold the assumed agent immediately responsible for damages, without waiting for the time when an action might be maintained on the contract itself; and the damages must be measured, not by the contract, but by the injury resulting from the agent's want of power. Whenever a person enters into a contract as agent for another, he warrants his own authority, unless very special circumstances, or express agreement, relieve him from that responsibility. (*Smout agt. Ilbery*, 10 *M. & W.* 9-10; *Pot hill agt. Walter*, 3 *B. & Ad.* 114; *Jenkins agt. Hutchinson*, 13 *Ad. & Elks*, *N. S.* 744; *Jeffs agt. York*, 10 *Cush.* 395; 5 *Sedd.* 585; *Story on Agency*, § 264.) An action upon such warranty must always be appropriate where personal liability attaches to an agent in consequence of his contracting without authority. In such action the plaintiff would be relieved from the necessity of showing performance of conditions precedent, and from the delay which the terms of the contract might require, if the remedy were limited to an action on the contract; and if special damages should be incurred in consequence of the agent's failure to bind his principal, such as the costs of an unsuccessful action

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against the principal to enforce the contract, they might be recovered. If the act of the agent were fraudulent, an action for the deceit would lie, but it would be a concurrent remedy with an action on the warranty, and so I apprehend must be the action on the contract itself, if the cases which sustain such action are to be regarded as correctly decided. In *Dusenbury* agt. *Ellis*, (3 Johns. Cases, 80,) the leading case in this state sustaining such an action, it does not appear what time the note executed by the assumed agent had to run at the time when it was given. Supposing it to have been given payable at a very distant day, was the holder, after discovering that Dusenbury had no authority from Sharpe (the assumed principal) to give it, bound to wait until the note became due, and then sue Dusenbury on the note as his contract; or could he repudiate the contract, and immediately sue Dusenbury on the warranty of authority, implied, or rather as I think expressed, in the execution of the note? There can be but one answer to this question, and that is in favor of the right to repudiate the principal contract, and to prosecute on the subordinate contract of warranty, whether the right between that course and an action on the principal contract existed or not. Whether Ellis, as indorsee of the note, could have maintained an action on the warranty, which was made originally to Fish the payee, might be doubtful, unless it appeared that the agent knew he was acting without authority, in which case, according to English decisions, he would be liable on the warranty to any one receiving the paper; the representation of his authority being in effect made to all to whom it might be offered in the course of circulation. (*Pettibill* agt. *Walter*, 3 B. & Ad. 114.)

If the party receiving the note in the present case must be charged, as claimed by the defendant's counsel, with knowledge of the extent of the defendant's ordinary powers as a deputy of the sheriff (which is very questionable), the want of special authority for this particular act was not

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communicated, and could not be known. The defendant, therefore, is not within the cases in which agents have been held excused from liability for acts beyond their authority, when they have acted in good faith, and the facts affecting their authority were equally well known to both parties. (*Smout agt. Ilbery*, 10 *M. & W.* 11; *Story on Agency*, § 265, 265 a.)

The recovery seems to have proceeded in the court below upon the ground that this was an action upon the note. It is rather, I think, to be regarded as an action on the warranty. The complaint states all the facts in respect to the making of the note by the defendant in the name of Snow, that he executed it without authority, and that the company issued the policy upon no other consideration than the note and the advance premium, relying on the authority of the defendant to execute the note. It also sets forth the proceedings in an unsuccessful suit against Snow on the note, and demands judgment for the costs of that suit, together with the full amount of the note, the assessments for losses being equal to that amount. On the facts stated, the law implies a warranty of authority by the defendant to execute the note for Snow, and it was unnecessary, under our present system of pleading, to allege that legal inference. (*Eno agt. Woodward*, 4 *Const.* 249, 253.) In an action on the note as the contract of the defendant, a claim for the costs of a suit to enforce the note against Snow would be absurd. The amount of the note, less the assessment paid, was made the measure of damages, as if the action had been upon the note; but the allegations and proof showed that the share of the losses of the company chargeable upon the note during the time covered by the policy prior to its surrender, were equal to the amount of the note. That possibly might be regarded as a proper measure of damages upon the breach of warranty, but whether that be so or not, no question having been made

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before the jury as to the amount of the recovery, if the defendant was liable at all, none can be made now.

I think the sheriff had an insurable interest in the goods, and that the policy was valid. The sheriff, by the seizure on the attachment, acquired a special property in the goods, which would have enabled him to maintain an action, and to recover their full value, against any one who should take them out of his custody. (2 *Saund.* 47, note 1; *Story on Bailm.* § 125; 2 *Mass.* 514; 3 *Hill*, 215.) Such special property gave him an insurable interest. It was his duty to keep the property safely until sold or released, and he was chargeable for its destruction by any cause against which he could protect it by ordinary care, if he was not subject to a more stringent rule of responsibility. (5 *Hill*, 588; 21 *N. Y.* 103.) Although he was under no obligation to insure, he could, if he chose, protect himself against this risk by insurance. "A bailee or depositary being liable by law or by contract for certain risks, whereby the subjects bailed or deposited may be damaged or lost, has an insurable interest in it in respect to such risks." (1 *Phil. on Ins.* 4th ed. 121, §191.) "A man is interested in a thing to whom advantage may arise, or prejudice happen from the circumstances that may attend it, * * and whom it importeth that its condition as to safety or other quality should continue." (2 *New Rep.* 302; 1 *Hall*, 84, 102-3.)

The policy having been obtained in the name of the sheriff, he had a right to ratify it at any time during the term of insurance (2 *M. & S.* 485; *Story on Agency*, § 248); although doubtless by doing so he would have ratified the giving of the note by the defendant, and made himself liable upon it. The section of *Story on Agency*, above referred to, shows that the underwriters bear the risk in such cases until there is a disavowal by the principal. This risk formed a consideration for the undertaking of the defendant, sufficient to sustain the recovery either upon the note

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or the warranty, and to the extent of that recovery, neither party having asked the court to submit the question of damages to the jury.

The position of the defendant's counsel is doubtless correct, that if the sheriff was authorized to insure the goods, the deputy who seized them might insure them in his name, but this power, for the reasons given above, did not authorise the deputy to give the note in question.

It is unnecessary to determine whether the expenses of insurance would constitute a claim in favor of the sheriff against the parties or either of them, or against the property. If the attachment was issued under the provisions of chap. 5 of the second part of the Revised Statutes (2 R. S. p. 3), it would doubtless be competent for the officer by whom the attachment was issued to allow such claim. (*Laws of 1830*, p. 411, § 36; 3 R. S. 3d ed. p. 925-6.) But without some special provision of statute on the subject, it is presumed that the claim of the sheriff for seizing and holding goods by virtue of attachments must be limited to the specific fees provided for the service of such process, without reference to the expenses to which he might be subjected in removing them to a place of reasonable security if their position were hazardous, or in such care of them as the law required from him (21 N. Y. 103), whether he should choose to remove them, or to bestow such care, or to protect himself against the possible consequences of neglect by insurance. (15 Wend. 44; 2 T. R. 148, 158; 7 M. & W. 413; 11 id. 620; 12 id. 31; 14 id. 802; *Crocker on Sheriffs*, §§ 1096-7, 1110-11; *Sewell on Sheriffs*, 252, 480, 481.)

It was within the powers of the company to issue the policy to Snow, and to take security, or receive the premium from the defendant, and to prosecute the defendant for any default in performing his engagements. The provision in the statute authorizing the corporation to maintain suits against members or stockholders (*Laws of 1849*, p.

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448, § 16), which is supposed by the defendant's counsel to limit the right of action of such corporation to suits against members or stockholders, was not designed to restrict its power to maintain suits, but to remove a possible doubt as to its right to maintain suits at law against members and stockholders, arising from the *quasi* partnership character of such companies. By section 17 these corporations are clothed with all the powers of any corporation to maintain suits.

If the action were to be regarded as brought, and the recovery had upon the note, it might be doubtful whether the judgment could be sustained, because the plaintiff has neither alleged nor proved enough to show to the court that the defendant was in default in paying the note, regarding it as his personal obligation. By the terms of the note it was payable, "at such time or times as the directors of said company may, agreeably to their act of incorporation, require." The act of incorporation here referred to is the charter of the company, which the statute requires the original corporation to make and file in the office of the secretary of state. (*Laws of 1849, ch. 308, §§ 3, 10, 12, 16.*) There does not seem to be anything in the statute under which the company was organized, to which the reference could be held applicable. Neither the pleadings nor the proofs show what the provisions of the charter of the union insurance company were, and consequently it does not appear whether the maker of the note was in default or not. The allegations in the complaint of notice of the assessment by publication and by mail, are put in issue by the answer, and if we could assume that those allegations indicated correctly what was required by the charter to charge the parties assessed, there is an entire want of proof on the subject. This objection is distinctly presented by the third ground of the defendant's motion for a nonsuit, and if the plaintiff was confined to a recovery on the note, I think this objection would be fatal to his

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action ; but regarding the liability as depending on the warranty, no assessment or notice was necessary.

Several objections were taken by the defendant to the introduction of testimony, but with the exception of those relating to the action against Snow, they are so clearly untenable as not to require notice. If this action were to be regarded as an action simply to charge the defendant as the maker of the note, the record in the case of Snow would not have been admissible against the defendant. Assuming that it was incumbent upon the plaintiff to show that the defendant was not authorized to make the note for Snow (19 *Barb.* 74), this record, to which the defendant was a stranger, was not admissible to prove that fact, or as having any tendency to prove it, though it might have been otherwise if seasonable notice had been given to the defendant, that his authority to make the note for Snow was denied in that suit, and requiring him to maintain his authority on the trial. (2 *Cow. & Hill's Notes*, 817.) If the record was inadmissible, the parol evidence of the grounds on which the decision proceeded was equally so. Nor was the record necessary to authorize the introduction of proof of what the defendant testified to on that trial, showing his want of authority. What he said in the witness box was admissible against him, as declarations made at any other time would be, without reference to his oath, or to the issues in the record. But resting the plaintiff's right of recovery, as I do, upon the warranty, the record was admissible to show that the plaintiff had been subjected to the expenses of an action in attempting to enforce the contract against the principal whom the defendant undertook to bind. These expenses, the action being brought in good faith, were a legitimate item of damages in the present action. (*Randell* agt. *Trimen*, 37 *L. & E.* 275; *S. C.* 86 *Eng. C. L. R.* 786; *Collen* agt. *Wright*, 40 *Eng. L. & E.* 182.) And the parol evidence was admissible to rebut a possible inference that the nonsuit was granted on account of some

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formal defect in the prosecution of the action. It is always competent to show by parol the grounds on which a verdict or judgment was rendered, when the grounds become material and do not appear in the record. (*Wood agt. Jackson, 8 Wend. 10, 45; Doty agt. Brown, 4 Comst. 71, 75.*)

The judgment should be affirmed.

SUPREME COURT.

JOSEPH LYITLE agt. JOHN ERWIN.

Evidence offered in a case of breach of warranty, which has a legitimate tendency to satisfy the jury that the warranty was not broken, or which may be material upon the question of damages, if there was a breach of the warranty in part only, is properly admissible, and its exclusion is sufficient ground to reverse the judgment.

St. Lawrence General Term, March, 1864.

BOCKES, ROSEKRANS, JAMES and POTTER, Justices.

APPEAL from judgment of county court.

This appeal is brought from a judgment of the St. Lawrence county court reversing the judgment of a justice of the peace. The action in the justice's court was to recover damages for a breach of warranty, on the sale of a horse, that the animal was without a fault, and that she was kind, gentle and good to work. The justice rendered judgment in favor of the plaintiff for \$60 damages and costs.

On the trial, the defendant's attorney asked the witness, John Erwin, the following questions, and made the following offer :

1st. State whether or not the mare was true to work while you owned her? To which plaintiff's attorney objected, on the ground of immateriality, and the justice sustained the objection.

2d. Was she gentle, kind and true to work while you

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owned her, and so far as you know at the time you sold her? Objected to by plaintiff, and the justice sustained the objection.

3d. The defendant then offered to prove by the witness, John Erwin, that the mare he sold to plaintiff, and for which damages in this action are claimed, was gentle and kind, and worked so for the defendant up to the time he let the plaintiff have her. The plaintiff objected, because such evidence was immaterial, and the justice sustained the objection. The defendant at the trial of the case, asked the witness, Michael White, the following question:

What kind of mare was she to work, as to gentleness and kindness? which was objected to by plaintiff's attorney as immaterial, and the justice sustained the objection.

The respondent claimed in the county court, that these several rulings of the justice were erroneous, as well as the judgment which he rendered.

MORRIS & VARY, *for appellant.*

MYERS & MAGONE, *for respondent.*

I. One of the material questions at issue in the case was, whether the mare was gentle and kind, and good to work, and the defendant clearly had a legal right to establish the truth of the warranty, but the justice through mistake, ruled differently, as appears by his several decisions, and excluded the evidence. No argument can be necessary to establish the materiality of the evidence offered by the defendant, as it was on the very point at issue in this case, to wit: the gentleness and kindness of the mare at the time of the sale. If not conclusive against the plaintiff's entire claim, nevertheless, it would go directly to the measure of the plaintiff's damage. It was quite necessary to know, in fixing the true value of the animal at the time of the sale, what her actual condition then was, the fact whether prior to that time she had been gentle, kind and good to work.

The nature of horses is such, that they frequently undergo

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great changes in their disposition, health and usefulness, in almost an incredible short space of time, by change of stabling, feed, harnessing and driving. Ignorant and cruel drivers, or some careless management, may, and often does, materially affect the usefulness of a horse. Such being the physical fact, if you exclude the evidence of the actual disposition and usefulness of the animal at the time of sale, what safety is there for vendors against the ignorance of unskillful horsemen, interested, prejudiced or perjured witnesses?

The correction is found only in allowing the very evidence that the justice excluded in this case, and without such a correction, the evil would be without remedy.

But it may be argued that although the justice erred in excluding the proposed evidence, yet, if the court can see that even though the rejected evidence had been admitted, still the balance of evidence would have been in favor of the plaintiff, and that therefore the judgment of the county court should be reversed, and that of the justice affirmed. Courts have sometimes endeavored to fix with legal precision just where to draw the dividing line, and to say that this or that particular piece of illegal evidence admitted, or this or that particular piece of material legal evidence excluded, could not have by any possibility affected the verdict, and therefore, notwithstanding such error committed on the trial, affirm the judgment. But no court or judicial officer, until the justice's decision in this case, we submit, had ever gone to the extent of holding that a defendant should not be allowed in an action for breach of warranty, to prove the warranty true. In *Underhill agt. N. Y. and Harlem R. R. Co.* (21 Barb. 489,) the question was discussed in the opinion of the court at general term, S. B. Strong, Justice. The court say:

"As there were exceptions to both, the admission and refusal, we are bound to yield to them, unless we are satisfied that they did not by any possibility prejudice the defendant."

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ant. Believing myself, that the rule often operates unjustly, I have frequently endeavored to confine its operation within what I conceived to be reasonable bounds, but without much success, as our judges have generally thought that they were bound to apply it rigidly, and that the legislature alone could furnish the appropriate remedy. In this case, the evidence improperly admitted, may have induced the jury to exceed the minimum price mentioned by the only other witness who testified upon that point; and therefore, the defendants may have been (although they probably were not) injured, and for that reason they are entitled to a new trial."

In *Boyle agt. Colman*, (13 *Barb.* p. 42,) which was a general term decision, opinion by Wm. F. ALLEN, Justice, in discussing the effect of the admission of illegal evidence, the court says: "The evidence was calculated to make an impression upon the minds of the jury, and it is impossible to say that it did not influence the verdict. If, therefore, it was incompetent, a new trial must be granted; especially as this case is before us for review upon a bill of exceptions." (See cases cited in opinion.)

In *Anthoine & Marais agt. Coit*, (2 *Hall Superior Court Rep.* p. 40,) opinion by JONES, Justice, in discussing this question of admitting illegal evidence, the court say: "I am compelled, therefore, to come to the conclusion that the verdict must be set aside, though I see no reason for supposing that there can be a different result from another trial."

The true rule appears to be, that where the court can clearly and without the *possibility* of mistake, determine that the verdict must of necessity have been the same, though the legal evidence excluded had been admitted, they will not set aside the judgment. That is, where secondary evidence may have been illegally admitted to prove a record fact, or any fact that does not admit of contradiction. In such case to reverse the judgment would be a mere exercise

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of power unattended with any practical result. But on the contrary, where the evidence excluded, not only goes to prove an entire defence to the plaintiff's claim, or if not entire, at least a partial defence; no court can say what the effect of the evidence might have been upon the mind of the court or jury. Upon this point the following authorities are, we think decisive. That even cumulative evidence, if improper, is cause of reversal. (*Osgood agt. Manhattan Company*, 3 *Cowen*, 612, 621; *Marquand agt. Webb*, 16 *Johns. Rep.* 49; *Anthoine agt. Coit*, 2 *Hall's Rep.* 40; *Strang agt. Whitehead*, 12 *Wend.* 64; *Penfield agt. Carpenter*, 13 *Johns. Rep.* 350; *Irvine agt. Cooke*, 15 *Johns.* 239; *Haswell agt. Barring*, 10 *Johns.* 128.)

II. Section 366 of the Code provides, that upon the hearing of appeals from justices' courts, the county court shall give judgment according to the justice of the case, without regard to technical errors, and defects that do not affect the merits.

The supreme court in some districts ignore this very plain provision of the Code, and in its stead adopt a very technical construction. However, this district in the case of *Ashley Ames*, appellant, agt. *Eli Bromley*, respondent, adopted the liberal construction. (*Manuscript opinion by Justice Rosekrans*.)

The St. Lawrence county court, acting clearly within both the letter and spirit of the Code, reversed the judgment of the justice in this case, and its judgment is consistent with the well established rule of law, and should be affirmed.

By the court, ROSEKRANS, Justice. This judgment was properly reversed by the county court. The defendant offered to prove that for more than a year, while he owned the mare, she was gentle and kind, and worked so for him. This evidence if admitted, would have had a tendency to show that such was the character and habit of the mare.

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at the time of the warranty, and might have satisfied the jury that the warranty was not broken. It was also material upon the question of damages, if there was a breach of the warranty in part only. For these reasons, the judgment of the county court should be affirmed.

The remarks of SELDEN, J. (18 N. Y. R. 293,) are applicable to this evidence and its rejection.

SUPREME COURT.

JOHN M. JAYCOX and others, appellants agt. ELIHU B. COLLINS, respondent.

The estate of a *tenant by the curtesy*, has survived the acts passed in 1848 and 1849, "for the more effectual protection of the rights of married women." Those acts were intended to allow a married woman to take and hold real and personal property to her separate use, free from the control or disposal of her husband, and free from all liability for his debts, and to enable her to make an effectual disposition of it by deed or will, and thus to place it, if she chooses, wholly beyond the power or reach of her husband; but if she omits to exercise her right of disposal, the acts are not intended to interfere with the laws of descent, in respect to the *real estate*, or the laws giving the husband the right of succession to the *personality*.

Seventh District, General Term, December, 1863.

E. D. SMITH, J. C. SMITH and WELLES, *Justices.*

THIS action came on for trial at the Monroe circuit, on the 17th day of October, 1863, before the Hon. T. A. Johnson, Justice. A jury trial was waived, and the case tried by the court.

The following facts were agreed upon and found by the court :

1st. That the defendant prior to the year 1850, intermarried with Julia B. Collins, and that on the 11th day of January, 1858, said Julia died, leaving her said husband and four minor children, the fruits of said marriage, her surviving.

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2d. That on the 25th day of February, 1850, the said Julia became the owner in fee simple absolute, of the lands and premises described in the complaint, from her mother-in-law, to hold in her own right, and for her sole use and benefit, and remained, together with her said husband in possession thereof until her death.

3d. That on the 17th day of September, 1859, the plaintiffs duly recovered a judgment in this court against the defendant, for the sum of \$133.32 damages, and \$15.89 costs, a transcript of which judgment was on the 20th day of September, 1859, duly filed, and said judgment docketed in the clerk's office of Monroe county, where said premises are situated.

That on the 27th day of September, 1860, upon an execution duly issued upon said judgment to the sheriff of Monroe county, against the property of said defendant, said sheriff duly sold his, defendant's interest in said premises, and plaintiffs became the purchasers thereof, and that plaintiffs thereafter duly received from said sheriff the usual deed, which was duly recorded in the clerk's office of the county of Monroe, prior to the commencement of this action, and that the defendant on a proper demand refused to deliver possession thereof to the plaintiffs, and that he and his said minor children, the fruits of said marriage aforesaid, have ever since, and do now remain in possession thereof.

The parties then rested, and his Honor Justice Johnson, decided that the plaintiffs were not entitled to recover the premises in question, and that the defendant had no life estate therein subject to plaintiffs' judgment and execution, and ordered judgment for the defendant with costs. To which decision and conclusion of law, the plaintiffs then and there duly and severally excepted.

An appeal was taken by the plaintiffs to the general term.

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HUNT & GREEN, *for plaintiffs.*

O. M. BENEDICT, *for defendant.*

By the court, JAMES C. SMITH, Justice. I am of the opinion that the estate of a tenant by the courtesy, has survived the acts passed in 1848 and 1849, "for the more effectual protection of the rights of married women," and therefore that the plaintiffs in this case are entitled to recover.

The reasons which lead me to this conclusion, are fully stated in the opinions delivered in *Hurd agt. Cass*, (9 Barb. 366,) and *Clark agt. Clark*, (24 Barb. 581,) each of which cases is an authority in point; and also in *Shumway agt. Cooper*, (16 Barb. 556); *Vallance agt. Bausch*, (28 Barb. 633), and *Ransom agt. Nichol*, (22 N. Y. 110); which last mentioned cases hold that the acts in question do not divest the husband of his right of succession to his wife's *personality*, on her decease, except where the power of disposal given to her by the statute is actually exercised. Of course that question is not identical in all respects with the question before us, as the one relates to personal property, and the other to real; but, as is said by Justice SUTHERLAND, in *Vallance agt. Bausch*, "both questions are mere questions of intention—how far the acts were intended to operate, and the reasons which tend to show that the husband's right to his wife's undisposed of personality on her death, is not inconsistent with the acts, in the main apply equally to the question of the husband's right or estate as tenant by the courtesy."

The construction adopted in the cases referred to, is simply this: That the acts of 1848 and 1849 were undoubtedly intended to allow a married woman to take and hold real and personal property to her separate use, free from the control or disposal of her husband, and free from all liability for his debts, and to enable her to make an effectual disposition of it by deed or will, and thus to place it,

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if she chooses, wholly beyond the power or reach of her husband, but that if the wife omits to exercise her right of disposal, the acts were not intended to interfere with the laws of descent, in respect to the real estate, or the laws giving the husband the right of succession to the personality.

This construction is also expressly affirmed in respect to tenancy by the courtesy, in the recent case of *Lansing* agt. *Gulick*, (26 *How.* 250.)

The only case cited in conflict with these views, is *Billings* agt. *Baker*, (28 *Barb.* 343.) Even if it were in point, I should consider it opposed to the weight of authority, but I am unable to see that it touches the question presented by the case at bar. The plaintiff in that case was a married woman, and the action was brought for the partition of certain real estate which came to her by inheritance subsequently to the acts of 1848-9. Her husband was made a defendant, under the impression that by the birth of issue and seisin of the wife during coverture, he had an *inchoate* interest as tenant by the courtesy. On the trial before a referee, one of the defendants was sworn as a witness in his own behalf. The plaintiff was then advised that her testimony was material in her own behalf, but that she was not a competent witness, by reason of her husband being a party. She thereupon moved at special term to strike out her husband's name as a defendant, to enable her to be a witness in her own behalf; the motion was granted, and on appeal, the order was affirmed. Now it is evident that the only question to be decided was whether the husband *during* coverture, had any interest in the separate estate of his wife, which made it necessary for *her* to bring him into court, to entitle her to a judgment of partition. In respect to that question, the decision is undoubtedly correct, and instead of conflicting with the other cases cited, is in harmony with them. During the *life time of the wife*, the husband had no interest in her real estate which per-

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mitted him in any way to interfere with her absolute right of disposal. As she could "convey her lands, * * or any interest or estate therein, * * in the same manner and with like effect as if she were unmarried," she could of course partition them either by agreement with her co-tenants and mutual conveyancers, or by suit; and in the latter case, it seems to me there was no more necessity of making her husband a party, than there would have been of his joining in a partition deed. Even assuming that he would have taken an estate as tenant by the courtesy, in case of her leaving the real estate undisposed of at her death, still, as he could not interfere with her absolute right of disposal in her life time, he had no more right to be heard upon the question whether partition should be made, than her children had, who in the like event, would have taken as heirs subject to his estate. If partition was made, his estate as tenant by the courtesy would be confined to the portion set apart to her. The question whether upon the *death* of a married woman, intestate, her husband takes as tenant by the courtesy in the lands of which she dies seized, had not arisen in respect to the lands of Mrs. Billings, and I think therefore that case can not be regarded as an authority upon this question.

I am in favor of reversing the judgment for the defendant, and granting a new trial.

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SUPREME COURT.

WILLIAM GRAHAM respondent, agt. WILLIAM M. SCRIPTURE
appellant.

As a condition precedent to a right of recovery by a party to a judgment, *leave to prosecute* the judgment must be obtained of the *court*. And without an *allegation* that such permission has been obtained, the complaint fails to show a *cause of action*.

It seems that the 71st section of the Code imports that *leave to prosecute*, should be obtained from the *court in which the judgment was rendered*. And perhaps a fair construction of the language of this section, would, in some cases, extend its application, so as to permit a motion for *leave to prosecute*, to be made to the *court which has control of the judgment and execution*.

An order for *leave to prosecute a judgment obtained in the late court of common pleas*, may be obtained from the *county court*.

St. Lawrence General Term, March, 1864.

ROSEKRANS, BOCKES and JAMES, Justices.

APPEAL from judgment rendered at special term, on demurrer to the complaint.

This action was brought upon a judgment alleged to have been recovered against the defendant, in the old court of common pleas of St. Lawrence county, in 1844. The action was brought pursuant to section 71 of the Code, which provides: "No action shall be brought upon a judgment rendered in any court of this state, without leave of the court, for good cause shown, on notice to the adverse party, &c." The complaint shows that the plaintiff obtained an order of the county court of St. Lawrence county, granting him leave to sue the judgment. The complaint does not show when the order was granted—or whether for good cause shown—or on notice to the defendant.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; substantially, that the plaintiff had not brought himself within section 71, for the reasons stated in the demurrer.

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The demurrer was argued at the last June circuit in St. Lawrence county, and was overruled—no reasons were given. From that decision the defendant appeals to the general term.

MORRIS & VARY, for appellant.

I. The county court had no jurisdiction of the matter, and its order granting leave to sue the judgment was a nullity.

1st. If the words "the court," in section 71, refer to the court in which the action is to be brought, the county court was not intended,—for it has no jurisdiction in civil actions. This action could not have been brought in that court. (*sec. 14, Art. 6, Cons. of 1846; Code, §§ 29, 30; Kundolf agt. Thalheimer, 2 Kern. 593.*)

2d. But if the court intended, is the one in which the judgment was rendered, the county court had no jurisdiction, unless it is identical with the old common pleas. But there is no more identity between them than there is between the present court of appeals and the late court of errors.

The county court is not the successor of the late common pleas, or is it even a substitute. The county court has no jurisdiction in civil actions, while the common pleas had.

The county court was a new creation of the constitution of 1846, (*see Art. 6, sec. 14, et seq.*) whose jurisdiction limited in civil cases to special proceedings, was to be thereafter prescribed by the legislature; then follows the judiciary act of 1847, defining its powers, &c. These again are modified by the Code; section 29 provides that it shall have no other jurisdiction than that provided in section 30, and abolishes all other statutes conferring or defining its jurisdiction. Section 30 contains no provision conferring such power on the county court. That clause of sub. 11, which confers on the county court "all other

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powers and jurisdiction," * * "if the late common pleas," does not extend the provisions of section 71 to the county court, unless the statutes in force before the Code, contained a provision in relation to the common pleas similar to that in section 71. But the only similar power given to the late common pleas, was to revive a judgment by *scire facias*, which has been abolished by the Code, section 428, and an action substituted therefor. (*Cameron agt. Young*, 6 *How. Pr.* 372; *Alden agt. Clark*, 11 *id.* 209; *Thurston agt. King*, 1 *Abb.* 126.)

3d. The question then recurs: In what court should the application to sue the judgment in this case have been made? We say in the supreme court, if any.

It has general jurisdiction in law and equity throughout the state. (Sec. 3, Art. 6 of *Cons. of 1846*.)

And the very point was decided by this court at the last October general term held in St. Lawrence county, in the case of *Gilson agt. Durkee*. In that case the plaintiff applied to the special term of this court, and obtained leave to sue a judgment recovered in the old common pleas of Clinton county. From that order the defendant appealed to the general term, on the ground that the motion should have been made in the county court of Clinton county. The court sustained the decision of the special term, holding that the county court had no jurisdiction, and that the motion was properly made in this court.

II. The question was properly raised by the demurrer to the complaint.

1st. The county court having no jurisdiction, its order granting leave to sue the judgment was void,—and being void it was not necessary for defendant to appeal from it. He could treat it as a nullity.

The plaintiff therefore brought this action without leave of the court, in the very teeth of section 71. He had no right to sue without leave—and if he had no right to sue, he had no cause of action, within the meaning of sub. 6,

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of section 144 of Code. It cannot be said that a complaint "states facts sufficient to constitute a cause of action," which does not show a present right of action. (*White agt. Brown*, 14 *How. Pr.* 282.)

2d. On the argument of the demurrer at special term, the plaintiff took the ground that the defect in the complaint, if any, was matter of form not of substance; and it is understood the court took the same views of it in overruling the demurrer. If redundant or irrelevant matter be inserted in a pleading, the proper remedy is by motion; so when it is indefinite and uncertain. But where it is wanting in a material allegation—one on which the very right of action or defence hinges—this does not go to the form but to the substance of the pleading, and the remedy is by demurrer. (*The People agt. Ryder*, 2 *Kern.* 439-40, 442.). In this case, Justice MARVIN at pages 439-40 says:

"The complaint is to contain a statement of facts constituting a cause of action." * * * "If the time when a fact happened, is material to constitute a cause of action, it should undoubtedly be stated; the fact without the time would be insufficient to constitute the cause of action." * * "Suppose the plaintiff alleges that he gave notice to the indorser of the dishonor of the note, but omitted to state when such notice was given, here the time is material; the fact will not constitute or aid in constituting a cause of action, unless it occurred at a certain time," &c. In this same case, Justice JOHNSON, at page 444, considers that section 160 of Code provides the remedy by motion, when the pleading is defective in form, but that the office of the demurrer, under sub. 6, of section 144, is to determine the right of the party to recover, free from all questions of form. See also a strong authority on this point, in the case of *Thatcher agt. Morris*, (1 *Kern.* 437.) In that case, the complaint omitted to state where the contract (the sale

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of lottery tickets) was made. Held on demurrer, to be a fatal defect.

Suppose the complaint had not shown any order granting leave to sue (and showing one merely from the county court is the same thing), but had simply alleged the recovery of the judgment; that it remained unpaid, and still belonged to the plaintiff, which is in fact the substance of the complaint in this case, would that have shown facts constituting a cause of action within sub. 6, of section 144? Clearly not. It would simply have shown good cause for applying to the court for leave to sue. The language of section 71 is "no action shall be brought," * * "without leave," &c. Leave of the court, therefore, is a material fact to be alleged and proved—it cannot be presumed.

III. The decision of the special term directing judgment final upon the demurrer, was erroneous.

If the defendant mistook his remedy in interposing the demurrer, he should have been allowed to answer over on terms. He has a right to take issue on the validity of the plaintiff's claim, and its payment.

MYERS & MAGONE, for respondent.

It was not necessary to aver in the complaint that leave had been obtained to sue the judgment, as provided in section 71 of the Code. Section 142 of the Code provides that the complaint should contain, first, the title of the action; second, a plain and concise statement of the facts constituting the cause of action; third, a demand for the relief to which the plaintiff supposes himself entitled. The complaint in this action contains all these.

It cannot avail the defendant, even though the county court had no authority to grant leave to sue the judgment. That objection can only be taken by answer, or rather on motion to set aside the summons and complaint.

Section 144 of the Code points out the several grounds

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of demurrer, only the sixth of which is assigned in this action.

It is provided by sections 28 and 29, chap. 280, vol. 1, session laws of 1847, over what subjects the county court shall have jurisdiction, and among those subjects is the right to try and determine according to law, suits and proceedings by *scire facias* to revive any judgment in said court, or that shall have been rendered in the present court of common pleas of said county, or to have execution of said judgment, or to revive any suit in said county court. In *Lyon agt. Manly*, (18 How. 267,) this question was raised by answer, the action having originated in a justice's court, and the general term decided that leave of the county court should have been first obtained, and reversed the justice's judgment on that ground.

By the court, BOCKES, Justice. The action is on a judgment rendered by the court of common pleas in 1844. The complaint alleges the recovery of the judgment, and that the same has not been paid; and further, that the county court of St. Lawrence county granted leave to the plaintiff to sue the judgment. The defendant demurred to the complaint, assigning as cause of demurrer that it did not state facts sufficient to constitute a cause of action.

The point of demurrer is, that the county court had no authority to grant the order giving permission to the plaintiff to bring the action on the judgment, and that such order is void.

The first question presented is, whether, in an action on judgment, it is necessary to aver that leave to prosecute the action had been obtained.

Section 71 of the Code of Procedure declares that no action shall be brought upon a judgment rendered in any court of this state, except a court of a justice of the peace, between the same parties, without leave of the court for good cause shown on notice, &c. This section was intro-

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duced to prevent a practice sometimes resorted to, conducive to no good end, and generally vexatious and oppressive. It takes away no right of value to the creditor, while it protects the debtor from unnecessary, harassing and burdensome proceedings. Under this provision, leave to prosecute is a condition precedent to the right of action on the judgment. Hence, according to rules of pleading, such permission should be averred, or the complaint fails to show a cause of action. A cause of action is synonymous with right of action—a right of recovery, and a complaint which does not show a right of recovery, fails to show a cause of action. The complaint should state facts sufficient, if admitted or proved, to authorize a recovery of judgment. But the holding of a judgment against a party merely, does not, since section 71 of the Code was adopted, give a right of recovery on it. As a condition precedent to a right of recovery thereon by a party to a judgment, leave to prosecute must be obtained of the court. Without an allegation that such permission has been obtained, the complaint fails to show a cause of action.

The next question is, from what court must the leave to prosecute be obtained? If the judgment be in the supreme court, no doubt can exist. Leave must of course be obtained of that court. That court alone has control of the judgment, and no motion could be made in the action in any other. So it seems to me the plain import of section 71 is, that leave to prosecute should be obtained from the court in which the judgment was rendered. The language of the section is: "No action shall be brought upon a judgment rendered in any court of this state, without leave of *the court* for good cause shown, on notice to the adverse party."

The court here mentioned is evidently the one last alluded to, which is the court in which the judgment was rendered.

There is obvious propriety in this construction, inasmuch

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as every court should control its own practice according to law, even to the manner of enforcing its judgment.

A fair construction of the language of section 71, would, in some cases extend its operation, so as to permit a motion for leave to prosecute to be made to the court which has control of the judgment and execution; and in such case leave would be well obtained from the court having control of the execution, although the judgment was originally rendered in another court.

In *Lyon agt. Manly*, (18 How. 267,) the judgment was recovered before a justice of the peace, and docketed in the county court. It was held that an action could not lie on it without leave of the county court to bring the suit.

On filing the transcript and docketing the judgment, it became the judgment of the county court. (*Code, sec. 63.*) So it was adjudged in the case cited, that leave to prosecute should be obtained from the court having control of the judgment.

In the case at bar the judgment was recovered in the late court of common pleas of the county of St. Lawrence.

If this is to be deemed a judgment of the county court, or if the county court has control of the judgment as regards its enforcement, then the case of *Lyon agt. Manly* is in point.

On examining and collecting the several enactments relating to county courts and their jurisdiction and powers, it seems very evident that it was intended that the powers of the county court should be exercised whenever necessary to aid in the enforcement of judgments rendered in the late court of common pleas. In effect, judgments of the court of common pleas became the judgments of the county court; executions on such judgments issued from the county courts. (*Section 55, judiciary act 1847. See also sections 30 and 56 of the same act; also Code, section 30, particularly sub. 11.*) A motion for liberty to issue execution on such judgments when necessary, or to set aside an ex-

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cution improperly issued thereon, or for a perpetual stay of execution, would properly be made in the county court. So it would seem to follow that the order for leave to prosecute a judgment rendered in the late court of common pleas should be obtained from the county court.

It is not necessary to decide that in all cases the order must be obtained from the court having control of the judgment on which suit is desired to be instituted.

Perhaps there may be cases when it would be appropriate and necessary to the attainment of justice, to obtain leave to prosecute from the court in which the action on the judgment is brought.

We mean here to decide only that in this case we deem the order granted by the county court giving leave to prosecute the judgment, well obtained. And we also deem the averment sufficient in substance. If at all defective, it is by reason of not being sufficiently specific. This defect, if indeed there be any, should be corrected by motion.

The order and judgment appealed from should be affirmed with costs.

ONEIDA COUNTY COURT.

JOHN H. LAMPERE respondent, agt. BARNARD A. HALL
appellant.

A cause of action for damages for the fraud and deceit of the defendant in the false reading of the hour of appearance named in a summons served upon the plaintiff's assignor in a justice's court, by means of which a judgment was obtained against him without any defence, is not assignable.

Oneida County Court, March, 1864.

THIS was an action brought for the false reading of a summons by a person deputized as a constable, so as to

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name a day different from the return day mentioned in the summons, whereby the defendant therein was misled, and judgment passed against him without any defence, to his damage by reason of losing his offsets, &c. The defendant assigned his claim for damages to the plaintiff in this suit, who recovered before the justice and a jury, and thereupon the defendant appealed to this court.

POMEROY & SOUTHWORTH, *for respondent.*
JOHN D. COLLINS, *for appellant.*

GEORGE W. SMITH, County Judge. The first question presented in this return is whether the fraudulent tort of a person acting in an official capacity, whereby a party suffers consequential damages, affords an assignable ground of action.

The familiar rule of the common law was, *actio personalis moritur cum persona*, and no action arising in the life time of the testator founded upon a wrong to person or property, and in form *ex delicto*, could pass to the executor. (*Wheatley agt. Lane*, 1 *Saunders*, 216, *note 1*, and *cases cited*.) The action survived only in cases of actions founded upon a contract, duty, or obligation, express or implied. (*Hamblly agt. Trott*, *Coup.* 371, 375.)

The statute of 4 *Edw. c. 7*, gave an action to the executor for trespasses to the goods and chattels of the testator in his life time, and that statute by a liberal interpretation was extended to cases of injury to the testator's property, whereby it became less beneficial to the executor. Among the actions thus given by this equitable extension of the statute were actions for false return (4 *Mod.* 403); for debt on a judgment suggesting a devasavit of the estate (2 *Ld. Raymond*, 973); for recovering goods taken on execution before the testator was paid his year's rent (1 *Str.* 212). But it will be found on looking into these cases that the actions were allowed because

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of the injury to the testator's right to acquired liens upon, or vested interests in personal property. In the case of *Williams agt. Carey*, (4 *Mod.* 403,) which is nearest like that in hand, the action was for a false return by the sheriff, in setting forth that he had levied by virtue of a *fieri facias* issued on the testator's judgment only a certain sum, whereas in truth he had levied more. Here the plaintiff had acquired a right by reason of the levy, of which the false return of the officer tended to deprive him. And in referring to such a case, *Rolle's Abrigment* says, such an action will not lie; and in the case itself, although frequently cited, no opinion appears to have been given, and only judgment *nisi causa*. So too, an action was allowed to the executor for an escape on mesne process in the testator's life time, the body of the prisoner being held as a pledge for the debt. Similar grounds of judgment are given in other cases of a like character. But among cases held not to be within the equity of the statute, are actions for slander, deceit and similar torts. (*Sir W. Jones*, 174; *Latch*, 168; 1 *Nent.* 187.)

The general principle to be deduced from these cases is, that where a party suffers consequential damages by a direct injury to a vested interest, right or lien, in respect of some particular property, as property levied on by virtue of an execution in his favor, goods upon which he has a lien for rent, tithes demandable by the parson, property of an estate wasted by an executor, escape of a person taken on execution and the like, an action survives to the executor. According to the observation of GOULD and PERRYS, Justices, in *Berwick agt. Andrews*, (2 *Ld. Raymond*, 973,) the ground of the action is that it "is a tort annexed to the goods," and that it arises "ex delicto mixed with a right."

The Code has introduced no new principle upon this subject, and the extent to which causes of action are transferred to executors and administrators, and by the bankrupt and insolvent acts, seems to remain the limit of the assign-

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ability of actions. Under the insolvent act of Pennsylvania, it has been held that even a claim for abuse of legal process against plaintiff did not pass, nor a claim for an excessive and malicious distress. It is also held there that an action for a deceit is not assignable, and in this state it is said in 3 *Kernan*, that such an action has never been considered assignable. (*Raymond* agt. *Fitch*, 2 *Cromp. & Mees. & R.* 588; *Sumner* agt. *Wilt*; 4 *Serg. & Rawle*, 54, 19, 28; *O'Donnell* agt. *Seybert*. 13 *id.* 54; *Zabriskie* agt. *Smith*, 3 *Kern.* 322.)

In *North* agt. *Turner*, (9 *Serg. & Rawle*, 244,) an action of trespass to goods was held assignable, on the ground of its relation to property, and the cases of *McKee* agt. *Judd*, (2 *Kern.* 622,) and *Gillet* agt. *Fairchild*, (4 *Denio*, 80,) are founded upon the same principle.

The tort complained of in *Zabriskie* agt. *Smith*, was for fraud and deceit in vouching for the solvency of a person who obtained credit from the plaintiff. It was held not assignable. No property was directly affected by the fraud, and it had no relation to any specific or distinct property or interest. There was a resulting damage to the plaintiff's estate, but this was as much an element for fixing the compensation, as of the essence of the tort. So assault and battery, slander and false imprisonment, may all consequentially affect a man's estate, but because they are wrongs primarily practiced upon him personally, they fall within the class of personal actions. Torts which operate upon specific things or tangible rights and interests, themselves capable of assignment, and so are separable from the person, seem to be the only class of torts which can be assigned. Other wrongs done to a party, although they may consequentially impair his estate, are personal, because they only affect his estate through himself.

The cause of action under consideration, is for the false reading by the defendant of the hour of appearance named in a summons served upon the assignor, by means of which

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a judgment was obtained against him without cause. The wrong alleged is pure fraud and deceit practiced upon the assignor. It had no relation to his property, and could only reach his estate by misleading him. The false imposition is a personal wrong, but as we have seen, the torts which have been held to be assignable are injuries which have had their first and direct effect upon specific property rights. The law requires parties to redress in their own behalf the wrongs directed against themselves, and if they fail to do this, such causes of action die with the person, and they are not allowed to be transferred as instruments of litigation into other hands.

The case of *Ford agt. Chandler*, supreme court, 5th district, (unreported,) was for a false return of service of a summons in justice's court, when in fact no service had been made, whereby a wrongful judgment was obtained against him on the defendant's failure to appear. The justice held the demand not assignable, and nonsuited the plaintiff. That decision was reversed by the county court of Oneida county, and on appeal, the supreme court in 1851, in an opinion written by Justice ALLEN, sustained the nonsuit on the ground assigned by the justice. That case is not distinguishable from this.

SUPREME COURT.

DAVID C. JUDSON appellant, agt. WILLIAM STILWELL
respondent.

It is a well settled principle of law, that if goods are sold by a factor or agent in his own name, without disclosing his principal, the purchaser has a right to *set-off a debt due from the agent*, in an action by the principal for the price of the goods.

But where the purchaser has *good reason to believe* that the vendor is acting as agent of some other person in making the sale, he will not be entitled to the

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benefit of a set-off of his demand against the agent. And a mere general notice—such as that the purchaser knew by report that the vendor was selling goods for another, or doing business in somebody else's name, or that he was acting as agent—is sufficient to deprive the purchaser of a set-off against the agent.

St. Lawrence General Term, March, 1864.

ROSEKRANS, BOCKES, JAMES and POTTER, Justices.

APPEAL by plaintiff from judgment of county court reversing the judgment of a justice of the peace.

Bush delivered a sewing machine to the defendant to try, and if upon trial he should be satisfied with it, to keep, for \$45, to be paid in a short time afterwards. Subsequently the defendant expressed satisfaction with the machine to Bush, and paid him \$20 of the price.

Bush was the agent of the plaintiff in selling sewing machines, and the machine sold to the defendant was one of them. At the time of sale, the defendant knew by report that Bush was doing business in somebody else's name. Bush advertised his business as agent, all along, in the village papers. At the time of sale, Bush did not represent to the defendant that he was acting for another. The defendant did not know from any one that the machine belonged to anybody else than Bush. The defendant did not know that any other person owned it. Bush offered to take a part of the price in groceries. He delivered to the defendant at the same time—the time of sale—a written bill of sale, of which the following is a copy :

Mr. William Stilwell, bought of R. W. Bush:

1 Wheeler & Wilson sewing machine.....	\$45 00
Credit by cash.....	20 00

	\$25 00

Ogdensburg, Feb. 4, 1862.

The defendant did not see Bush's advertisement until after the purchase of the machine. At the time of the purchase the defendant held and owned Bush's matured, and past due, and unpaid note, of an amount larger than

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the unpaid balance of the purchase price of the machine.

The justice gave judgment for the plaintiff, excluding the set-off. The St. Lawrence county court reversed that judgment, and the plaintiff appeals to this court.

MYERS & MAGONE, for appellant.

I. The defendant not having pleaded any set-off, was not entitled to have any allowed.

Up to the present time the pleadings present no issue upon a set-off. But perhaps, if it were "in furtherance of justice" to place the respondent in a position whereby he might acquire the payment of a debt against an insolvent, purchased for fifty cents on the dollar, out of the property of an innocent party, against whom, individually, he does not profess to have any legal, moral or equitable claim whatever, then perhaps, the court might allow the amendment. But when such amendment would be "in furtherance of" injustice, and of the designs of "a prowling assignee," the court looking kindly on a technical objection, interposed to obstruct a technical and dishonest claim, will not exercise its powers to accomplish a wrong.

II. There being no evidence of any set-off in the case, the defendant was not entitled to have any allowed.

The note sought to be set-off was not read nor put in evidence. The signature of Bush was merely identified. Why it was done remains unexplained. It may have been altogether for a different object than that of offsetting it against the plaintiff's demand. In fact the condition of the defendant's answer in not pleading a set-off shows conclusively that identification of signature must have been for another purpose.

But suppose it was intended, when signature was proved, to introduce the note by way of set-off, and the intention was abandoned, either from supposing it (as we claim) not to be a proper set-off against Judson, or for some other

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reason. Can the court now relieve the defendant from the effects of the act? The Code, we admit, is very ample in its power of correcting the mistakes of careless and unwary attorneys, but it is respectfully suggested that it has not gone the length of patching up a case by supplying testimony which may have been intentionally withheld, or carelessly omitted to have been given.

III. But even if the note had been pleaded and read in evidence, it was not a proper set-off to the plaintiff's demand, inasmuch as the respondent knew, or had good reason to suppose at the time he purchased the sewing machine, that it was not the property of Bush.

That the machine was in fact the property of Judson, the respondent does not attempt to deny. That when he bought it he knew that Bush was selling sewing machines in somebody else's name, he expressly admits in his testimony. He claims, however, that inasmuch as he did not know such principal to be Judson, he should be allowed to pocket the avails of his speculation. In other words, notwithstanding his knowledge of Bush's whole action in business was as agent for some person, there being no pretence of his being engaged in business for himself—remaining persistently ignorant of the name of such principal, so that he could conveniently swear as he did, that he did not know from any one that the machine belonged to anybody else than Bush; that he has entitled himself, as the reward of well-timed supineness to wring the avails of his worthless note out of the property of a stranger. Let us see if the law sanctions such sharp financing as this.

Conceding (for it is needless to the argument to dispute it) that as a general rule a vendee dealing with an agent not disclosing the name of his principal, retains his right to set-off a claim against the former, even in a suit brought by the latter, yet it will be found to be equally well settled that if the vendee knows the man with whom he is dealing is acting as agent, even though he may not know the prin-

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cipal's name, it is sufficient to change the rule and destroy the right of set-off, as against such principal.

In *Hogen & Miln* agt. *Shorb*, (24 *Wend. Rep.* 458, at p. 462.) *Bronson*, Justice, says: "When the name of the principal is disclosed at the time of sale, the vendee has no right to set up any equities between himself and the factor to defeat the action of the owner; and the same consequence will, I think, follow if the vendee knew or had good reason to believe he was dealing with the agent of another, although the name of the principal was not disclosed."

The same doctrine is also clearly upheld in *Maans* agt. *Henderson*, (1 *East*, 169.)

In the editor's note to the case of *George* agt. *Claggett*, (2 *Smith's Leading Cases*, old paging 77, p. 185 of 5th American edition,) after stating the general rule that ignorance of the agency will permit the vendee's demand against the agent to be used as a set-off against the principal, he proceeds to say: "However, the latter part of this rule only applies where the party contracting has not the means of knowing that the party with whom he contracts is but an agent. If he have the means of knowing, and though he may not be expressly told, still must be supposed to have known that he was not dealing with a principal, but with an agent, the reason of the above rule ceases, and then *cessante ratione, cessat lex.*"

In *Baring* agt. *Corrie*, (2 *B. & A.* 137,) *Coles & Co.* who were brokers and also general merchants, sold to *Corrie & Co.* in their own names, sugars belonging to *Baring, Brothers & Co.* who brought this action for the price. The vendees sought to set-off a demand against *Coles & Co.* The true nature of the contract was entered by *Coles & Co.* in their broker's book, which the defendants might, if they pleased, have seen. *BAYLEY*, J. said: "There is another circumstance by which the defendants might easily have ascertained whether *Coles & Co.* acted as brokers or

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not. According to the usual course of dealing, a broker is bound to put down in his book an account of the sales made by him in that capacity, so that if the defendants had asked to see the book they would instantly have discovered whether Coles & Co. had acted as brokers or not. I therefore think that the defendants were not imposed on, and even supposing they were, they were guilty of gross negligence. I cannot think that the defendants believed when they bought the goods, that Coles & Co. sold them on their own account, and if not, they cannot have a defence to the action."

The facts of the case cited were much stronger in favor of the defendant than the one under consideration. Coles & Co. besides being brokers, carried on a general merchant business on their own account. The only business pretended to be carried on by Bush was for somebody else than himself. It was much easier to suppose, therefore, that Corrie & Co. might have been deceived as to the nature of their transaction with Coles & Co. whether it was with them as agents or principals, than that Stilwell, with his knowledge of the fact that Bush's sole business was transacted in the name of another, could have believed for a moment that Bush was acting as principal. In other respects the cases are similar—there was the same kind of voucher or receipt for the article sold, made out in the name of the agent—there was the same gross negligence in not making inquiries in each case.

In *Henry agt. Marvin*, (3 E. D. Smith, 71,) the court not only holds the rule to be as enunciated in the cases just cited, but goes far beyond it, and decides that in no case can the principal be mulcted in the amount of a pre-existing debt which the vendee held against the agent. They say: "When an agent for another sells the principal's goods, the purchaser may pay the purchase money to the agent, or settle with the agent by any bona fide arrangement by which he parts with money or property upon the

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faith of the agent's apparent authority in the matter. But placing the amount to the credit of the agent against a pre-existing indebtedness is not such a payment, and the principal (the owner of the goods) may recover therefor, notwithstanding such credit, and although at the time of the sale the purchaser was not informed of the name of the principal, and this is especially true when the purchaser was aware that the goods were held by the vendee as agent for sale." (See also *Brown* agt. *Robinson*, 2 *Caine's Cas.* 343.)

IV. The knowledge of Stilwell that Bush was acting as agent in the sale of the sewing machine, was a question of fact for the justice to decide, and he having found in favor of the plaintiff thereon, his finding (inasmuch as there is at least some evidence to support it) cannot be reviewed on appeal.

The evidence going to show such knowledge is:

1st. The defendant's admission that he knew by report that Bush was doing business in somebody else's name.

2d. The equivocal, negative testimony of the defendant, and his evident laboring to avoid committing himself by swearing to belief, and confining himself to actual knowledge.

Schedule A in no manner shows that Bush was the owner of the machine. It is not a bill of sale, but a mere voucher or receipt. (See *Filkins* agt. *Whyland*, 24 *N. Y. Rep.* 338.)

For authorities on the proposition that a finding of fact by a justice, when there is some evidence to support it cannot be reviewed on appeal. (See *Supreme Ct.* 1815, *Wooden* agt. *Hoofut*, 12 *Johns.* 298; 1841, *Whitney* agt. *Crim*, 1 *Hill*, 61; 1842, *Baum* agt. *Tarpney*, 2 *id.* 75; 1845, *Carman* agt. *Newell*, 1 *Den.* 25; 1849, *McDonald* agt. *Edgerton*, 5 *Barb.* 560; 1851, *Dunckle* agt. *Knocker*, 11 *id.* 387; 1852, *Ac'sit* agt. *Wilson*, 7 *How. Pr.* 64; *Kasson* agt. *Mills*, 8 *id.* 377; 1854, *Bennett* agt. *Scutt*, 18 *Barb.* 347; 1856, *Rogers* agt. *Ackerman*, 22 *id.* 134 *N. Y. Com. Pls.*; 1850, *Needles* agt. *Howard*, 1 *E. D. Smith*, 54.)

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V. The judgment of the court should be reversed and that of the justice affirmed with costs. Every principle of law and equity demands it.

J. MACNAUGHTON, *for respondent.*

I. The defendant did not know that Bush was the agent of the plaintiff.

The general rule of law applicable to purchases from an agent, by one not knowing his representative character, and not having good reason to believe the fact, is stated in the elementary books :

"If an agent be permitted to deal as if he were a principal, the party dealing with him and ignorant of his representative character, is entitled to the same rights against him as if he were in fact principal, so that under these circumstances he may set off against the demand of the principal, a debt due from the factor to himself. (*Dunlap's Paley on Agency*, 325 ; *Story on Agency*, 3d ed. § 390.)

Rabone agt. Williams, (7 T. R. 356, No. a,) was as follows : The plaintiffs sold goods to the defendant by means of the house of Rabone, their factors. The defendant, vendee of the goods, set off a debt due to him from Rabone, the factor, upon another account. Lord MANSFIELD, Ch. J. : "When a factor dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him, to all intents and purposes, as the principal ; and though the real principal may appear and bring an action upon that contract against the purchaser of the goods, yet that purchaser may set off any claim he may have against the factor, in answer to the demand of the principal. This has been long settled." (See the same principle decided in *George agt. Claggett*, 2 *Smith's Leading Cases*, reported also in 7 T. R. 399 ; and see notes to the report in 2 *Smith's Leading Cases* ; *Stacy agt. Decy*, 7 T. R. 361 ; *Blackburn agt. Scholes*, 2 *Camp.* 341.)

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Subsequent cases uniformly follow and sustain this doctrine. It is asserted emphatically by Bronson, Ch. J. in *Hogan* agt. *Shorb*, (24 *Wend. R.* 458). If the sale be in terms for cash, the vendee has the same right of off-set. (*Id.* 11 *Pick. R.* 159.)

II. The defendant had not good reason to believe he was dealing with an agent.

In the case in *Wendell*, the court says: "It will not do to guess that the vendee had notice, but it must appear from the nature of the transaction, or from something which transpired before the contract was completed, that the vendee had good reason to believe he was dealing with an agent."

The defendant's knowledge by "report," that Bush was doing business in somebody else's name, might have suggested an inquiry as to the representative character of Bush, had not Bush's conduct and acts contradicted the truth of the report, and had they not also conveyed positive information that Bush was owner of the machine, and dealing on his own account.

Bush did not represent his agency. He offered to take a part of the price in groceries,—factors usually selling for cash.

He made a bill of sale in writing, and delivered it to the defendant at the time of sale, representing himself on it as proprietor, thus positively contradicting what defendant had heard by report—that he was doing business in another's name—affirming his ownership, and forestalling any inquiry that the report could have suggested.

III. The defendant was not bound to make inquiry as to the ownership of the property, but he should have been afforded good reason to believe "that the person with whom he dealt was agent." (*Hogan* agt. *Shorb*, *above cited*.)

The rule *caveat emptor* does not apply to the title to personal property, but only to the quality. The person in possession of personal property offered for sale, impliedly

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warrants the title in himself when he assumes to act as principal, and in his principal when he assumes to act as agent. (2 *Kent's Com. title Caveat Emptor*; *Burrill's Law Dictionary, same title.*)

IV. If a loss must ensue in this case, it must fall on the plaintiff.

The rule is, that when a loss must fall on one of two innocent parties by the deceit of a third, it should fall on him who by his confidence and trust puts the deceiver in motion. *Passim.*

The defendant would not have purchased the machine had he not supposed he could off set his demand against Bush, and to deprive him of the right would be in contravention of the rule, and be a fraud upon him. (*Hogan agt. Shorb, ante.*)

V. The plaintiff seeks by his action to found derivative rights upon the acts of his agent, and not to avail himself of his original rights in his own property paramount to these acts, and independent of them, and so he must take them with all the responsibilities, charges and incidents annexed to them. (*Qui sentit commodum sentire debet et onus. Story's Agency, § 389.*)

By the court, BOCKES, Justice. It is urged that the defendant's set-off was not admissible, because not set up in the answer. Also that the note sought to be set off was not read in evidence. But neither of these objections were raised on the trial before the justice, where they could have been readily obviated if taken, and they are not therefore now subjects of consideration.

The question in this case is in regard to the claim of the defendant to set off the note of Bush against the plaintiff's demand in this action.

It is a well settled principle of law that if goods are sold by a factor or agent in his own name without disclosing his principal, the purchaser has a right to set off a debt due

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from him, in an action by the principal for the price of the goods. (*Story on Agency*, §§ 390, 404, 419, 420, 444; *Rayborn* agt. *Williams*, 7 T. R. 356, note a; *George* agt. *Clagett*, 7 T. R. 355; *Westwood* agt. *Bell*, 4 Camp. 348, 353; *Barring* agt. *Corrie*, 2 *Barn. & Ald.* 137; 3 *Hill*, 72, 2 *Kent*, 632; *Hogan* agt. *Shorb*, 24 *Wend.* 458; *Bliss* agt. *Bliss*, 7 *Bosworth*, 339.) This rule however is subject to the qualification, clearly stated by Judge WOODRUFF in *Bliss* agt. *Bliss*, that though the sale be made without disclosing the principal, yet if the purchaser knows or has reason to believe that the seller is not the owner, but is acting in the sale as an agent, the purchaser can not make the set-off. Judge BRONSON says, in *Hogan* agt. *Shorb*, that: "When the name of the principal is disclosed at the time of the sale, the vendee has no right to set up any equities between himself and the factor, to defeat the action of the owner; and the same consequence will, I think, follow if the vendee knew or had good reason to believe he was dealing with the agent of another, although the name of the principal was not disclosed." This qualification of the rule above stated, is marked in all or nearly all the cases above cited. And it was said in *Barring* agt. *Corrie*, by BAYLEY J. in effect, that when the purchaser had the means of knowledge, and the circumstances were such as should have put him on inquiry, he was negligent in not inquiring, and could not make such set-off against the true owner. (*Moore* agt. *Clementson*, 2 Camp. 22; *Maans* agt. *Henderson*, 1 *East*, 335; *Fish* agt. *Kempton*, 7 *Man. Gran. & Scott*, 687; *Brown* agt. *Robinson*, *Caines' C.* 341; *Gordon* agt. *Church*, 2 *Caines'*, 299.) The question, therefore, to be here determined is this: Did the defendant, when he made the purchase of the sewing machine, know or have reason to believe that Bush was selling as agent and not as principal; or were the circumstances such as to put him on inquiry in that regard? If so, then, according to a long line of authorities, the defendant was not entitled to his set-off.

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I am inclined to the opinion that there was evidence in the case sufficient to make it a question of fact whether the defendant had not reason to believe that Bush acted as agent; also, whether the circumstances were not such as should have put him on inquiry in that regard.

It seems that the defendant knew by report that Bush was doing business in the name of another; that is, that he was doing business, or assuming to do business, for another. The defendant also purchased the note for fifty cents on the dollar, raising an inference of Bush's irresponsibility. Bush had advertised his business as agent in the village papers, which, however, the defendant had not seen until after the purchase; and the bill of sale was made in Bush's name. On this evidence, was not the justice authorized to find, either that the defendant had good reason to believe that Bush was selling as agent, or that the circumstances attending the sale were such as to put the defendant on inquiry in that regard? The fact that the bill of sale was made in the name of Bush, is not conclusively in defendant's favor; but this must be considered in connection with the other evidence.

In *Barring agt. Corrie*, the bill of sale was in the name of Coles & Co., who were agents merely. In the case cited, **ABBOTT**, C. J., says: "They (the defendants) knew that Coles & Co. acted as brokers and merchants; and if they meant to deal with them as merchants, and derive a benefit from so dealing with them, they ought to have inquired whether, in this transaction, they acted as brokers or not; but they make no inquiry." And he adds: "They might have made inquiries in the circumstances of the case if they had not chosen to remain in ignorance." So in the case in hand, the defendant knew by report—that is, he had been informed—that Bush was doing business in the name of another. This was the same in substance as if he had seen the advertisement in the newspapers, for in such case he would have known that he was doing business for

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another *by report*—*by hearsay*. In this the case is very like *Barring* agt. *Corrie*. In that case the defendant knew that Coles & Co. acted as brokers, and also as merchants. So in the case at bar, under the most favorable construction to be given it, the defendant knew—having been so informed—that Bush acted for another in some of his business transactions. *Abbott*, C. J. says in substance, that in cases when the party acts for another, as well as on his own account, the vendee should inquire, or remain in ignorance at his peril. The argument of *Bayley*, J., in *Barring* agt. *Corrie*, is to the same effect. In *Brown* agt. *Robinson*, (*Caines' Cases in Error*, 341,) the facts were these: The plaintiffs consigned the property to Cooke, to be sold by him as their factor. Cooke sold to the defendant without notice that he was plaintiff's agent, nor, as the case states, was there any evidence offered to show that they knew that he acted as agent for the plaintiffs, or any other person. But it was proved "that it was generally known that Cooke was factor to the plaintiffs, and that he then transacted business as well on his own account as upon commission." The court held that the defendants could not set off a debt (promissory note) due to them from Cooke. Judge *Bronson* says in *Hogan* agt. *Shorb*, that a mere general knowledge that the person selling the goods is a factor, if he also carry on business on his own account, will not be sufficient to charge the vendee with notice, and cites *Moore* agt. *Clemension*, (2 *Camp.* 22). This observation does not seem in entire consonance with the case of *Barring* agt. *Corrie*, and *Brown* agt. *Robinson*. But Judge *Bronson* recognizes the rule that if the vendee have *good reason to believe* that the vendor is acting as agent of some other person in that particular transaction, he will not be entitled to the benefit of set-off of a demand against the agent. In *Bliss* agt. *Bliss*, (7 *Bosworth*, 339,) the bill of sale was in the name of the agent, with the addition "foreign dry goods commission merchant." It was held that these words

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conveyed notice of his agency to the vendees, or were sufficient to put them on inquiry, and their set-off was not allowed.

The introduction of these words into the bill of sale, make, in my judgment, an important distinction between that case and some others cited. But there was in the case under examination, no evidence that Bush carried on any business on his own account, certainly no more than there was in *Barring agt. Corrie*. It seems therefore, that according to the decisions, a mere general notice to the vendee that the vendor is acting as agent, is sufficient to deprive him of his set-off of a debt due him from the agent in an action by the principal.

In my judgment there was sufficient evidence in the case to support the finding of the justice; if so, his judgment should have been affirmed by the county court.

I must advise the reversal of the judgment of the county court, and the affirmance of the judgment of the justice.

I have arrived at this conclusion after considerable hesitation and study, inasmuch as it was against the judgment of a court whose opinion is entitled to the highest consideration.

NEW YORK SUPERIOR COURT.

WILLIAM LOESCHIGK and others, agt. MORRIS JACOBSON and others.

An assignment for the benefit of creditors, containing a provision that the assignee, out of the proceeds of the assigned property, "protect, save harmless and indemnify the party of the second part of and from the payment of any sum by reason of his having executed a *covenant of suretyship*, for the payment by the assignors of certain rents, amounting to \$3,500 a year, payable quarterly, covered by a lease then having about four years to run," does not invalidate the assignment.

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New York Special Term, April, 1864.

THIS is an action in the nature of a creditor's suit, brought to set aside an assignment, and also to reach certain household furniture alleged in the complaint to belong to one of the then judgment debtors, and to be held for his use by another of the defendants.

WILLIAM WATSON, *for plaintiffs.*

A. BOARDMAN, *for defendants.*

BARBOUR, J. By the assignment, made in April, 1861, the then assignors, members of a firm, convey to the assignee all the estate, real and personal, jointly held by them, in trust, to convert the same into money, and out of the proceeds "to protect, save harmless and indemnify the party of the second part, of and from the payment of any sum by reason of his having executed a covenant of suretyship" * * "for the payment by the assignors of certain rents, amounting to \$3,500 a year, payable quarterly, covered by a lease then having about four years to run." As this is the only important direction which is objected to by the plaintiffs, it is unnecessary to state the further provisions of the assignment.

The direction objected to does not constitute a trust to hold a portion of the funds to indemnify the assignee for such sums as he may be compelled to pay upon a contingent liability, and which, from the nature of the obligation, he may never be required to pay at all, but it is a direction to pay the rents as they shall become due; for in no other way can the guarantor be fully protected and saved harmless, of and from the payment of such rents. It is, therefore, a trust to pay certain sums, not yet due, at certain fixed periods as they shall accrue; to which, under numerous decisions, no valid objection can be made. It follows that the assignment must be sustained.

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The plaintiffs failed to show by this evidence I think, that the furniture of the defendant Jacobson, alleged to be held by contract, comprised any articles other than those which were by law exempt from sale on execution.

The defendants must have judgment dismissing the complaint, with costs.

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SUPREME COURT.

JACOB DECKER agt. STEPHEN HASSEL.

Where the plaintiff's son is hired by the defendant for two months, at \$15 per month, to work on his farm, and at the end of five days, the defendant discharges him, saying he don't want him any longer, the plaintiff can recover the full two months wages.

The defendant's son, on going to the plaintiff, saying "his father (defendant) had sent him to hire a hand," is a sufficient general authority to make such a contract of hiring.

The appellate court will not charge a justice of the peace with improperly denying an application for an adjournment of a cause, and not giving any reasons for it at the time, without such error affirmatively appears. It will be inferred, in the absence of anything to the contrary, that the justice openly stated his reasons for refusing the adjournment.

The whole of a justice's judgment will not be reversed for an error of the justice in allowing a small item of claim—the remaining part of the judgment being correct. The appellate court have full power, under the Code, to reverse in part and affirm in part a justice's judgment for entire damages. (To the same point and effect is Staats agt. Hudson R. R. Co. 23 How. 483.)

Albany General Term, December, 1863.

Present, HOGEBOOM, PECKHAM and MILLER, Justices.

THIS is an appeal from the judgment of the Albany county court affirming the judgment of a justice of the peace. The justice rendered a judgment for \$30.42 damages, besides costs, upon an alleged contract for the hiring by defendant from the plaintiff, of his son, to work on defendant's farm for two months, at \$15 per month. The son worked five days and was discharged by defendant. Plaintiff also recovered forty-two cents for horse feed and

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for a dinner furnished defendant's son when he was at plaintiff's to hire plaintiff's son. The defendant appeals to this court.

NORMAN W. FALK, for plaintiff.

HENRY SMITH, for defendant.

PECKHAM, Justice. On the argument of this cause, I was thoroughly impressed that there was no sufficient evidence of the agency of the defendant's son to make the contract of hiring. On examination I have arrived at a different conclusion. The case shows that he went to plaintiff and told him that "his father (defendant) had sent him to hire a hand." He did hire him for two months, at \$15 per month, to work on defendant's farm, and to work with defendant. He did work on defendant's farm for five days, and then defendant discharged him, saying he did not want him any longer. This is all the evidence touching the authority, contained in the case. The statement of the son of plaintiff that went to work for defendant on his farm upon said contract, adds nothing to the proof. The contract was made about the 27th or 28th of April, and the plaintiff's son commenced work on the 28th of April. From this evidence it may legitimately be inferred that the defendant authorized his son to hire a hand to work on defendant's farm—that he had that general authority. If the defendant gave his son a special authority merely—if he were a special and limited agent to hire by the day only, I think the *onus* was upon the defendant to establish it. *Prima facie*, an authority to hire would authorize a contract of this sort, especially, given to a son. It is not an unusual hiring. If a person authorize another to sell a horse, the agent may warrant unless forbidden. (*Dunlop Pa. on Agency, 4th ed. 197, and cases there cited.*)

The authority to sell being established, I think the power to warrant is *prima facie* established.

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The contract being proved, the plaintiff was entitled to recover for the two months wages under the proof. (*Costigan agt. M. & H. R. R. Co.* 2 Denio R. 609.)

It is insisted here that the justice erred in not granting an adjournment, as he returns: "On the grounds of suspicion that the application was not made in good faith, and also because defendant did not show where said witness resided, or that he ever expected to procure his attendance on the adjourned day."

It does not appear by the return whether the justice announced to defendant there at the time the grounds of his decision, and I have a strong suspicion that he did not, as there is every probability that the technical objection as to residence of the witness could have been easily obviated, and also the probability shown of procuring his attendance on the adjourned day. One of these witnesses, as I infer by the name, had been previously subpoenaed by the plaintiff. There is some ground for belief that the adjournment was not fairly denied, still the rule is a sound one, that he that alleges error must show it affirmatively. If the justice quietly and without open declaration refused this adjournment, when the action of the parties by the oral examination of the defendant rather assumed that the residence of the witness was well understood, and his attendance easily secured, as no question or objection of that kind was made, I think the justice plainly erred, and the judgment should be reversed. But if this were the fact, the defendant might easily have had it so distinctly appear in the return.

This court will not charge the justice with an error of this kind, without it affirmatively appears. I think it must therefore be inferred in the absence of anything to the contrary, that the justice openly stated his reasons for refusing the adjournment.

It is further objected by defendant's counsel, that the plaintiff recovered forty-two cents for feed for the horses

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of defendant, and for a dinner for defendant's son. There was no proof that these were had for the defendant, or that he was in any manner responsible for them.

The proof is simply that "defendant's son had of me (plaintiff) for his horses, one peck of provender and some hay, also dinner." The justice therefore erred in allowing these items in the judgment against the defendant.

What is the consequence? Must the whole judgment be reversed because a mistake is made as to this small item? I think not. The principle decided in *Staats* agt. *H. R. R.* (23 *How.* 463,) will allow this court to do what the county court ought to have done, affirm the judgment as to the contract for the two months work, and reverse it as to this separate item. This reverses it in part and affirms it in part. We do not assume to weigh evidence, or in any manner to decide a question of fact, but whenever a separate distinct item is erroneously allowed by a justice of the peace, there being a total failure of evidence to sustain it, and a correct judgment is given for other matters; it is the duty of a county court, on appeal, to affirm the judgment in part, and to reverse it in part. If that court fail in its duty, this court on appeal, must give the judgment the county court ought to have given. The power to give such judgment is as plainly given to the county court as language can express. After enacting "that the appellate court shall give judgment according to the justice of the case," it is further declared, that "in giving judgment, the court may affirm or reverse the judgment of the court below, in whole or in part, or as to any or all the parties, and for errors of law or fact." (*Code*, § 366.) It is difficult to find broader language as to this power. Its justice is equally plain. There is little propriety in reversing an entire judgment, because a small item is allowed without any legal proof. It is plain that the legislature have endeavored to confer this power upon the court. The courts have seemingly inclined to repudiate it. The Code

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is broader in some respects than the Revised Statutes; in its purpose to have the appellate court render the judgment that the court below ought to have rendered. In this case, I think the judgment of the county court should be affirmed in all things except as to the forty-two cents; that as to that item it should be reversed, without costs to either party on this appeal.

MILLER, J. concurred.

HOGEBOOM, J. dissented as to costs of the appeal, and was in favor of granting costs to the respondent.

ERRATA.

On page 192, line 12 from the top, for the word "variance" read "waiver." On same page in line 11 from the bottom, leave out the word "the" between "in" and "furtherance."

On page 126, on the 18th line from the bottom, for "state decisions" read "stare decisis."

DIGEST
OF THE
POINTS OF PRACTICE
AND
OTHER IMPORTANT QUESTIONS,

CONTAINED IN THE FOLLOWING REPORTS :

26 *Howard's Pr. R.*; 25 *New York Reports*; 39 *Barbour's R.*;
and 16 *Abbott's R.*

ACTION IN BAR.

1. In an action for a *divorce* for alleged adulteries of the defendant, during a certain period, the plaintiff is not required to proceed by *supplemental complaint*, but may commence a *second action* demanding the same relief for alleged adulteries with the same person, charged to have occurred *after the commencement of the first action*; and an answer of the defendant to the second action, of another action pending in the court for the same cause, is *insufficient*. (*SUTHERLAND*, J. dissenting.) (*Cordier agt. Cordier*, ante 187.)
2. In order to render a plea of another action pending, a valid defence, it must appear that the two actions are for the same identical cause of action. (*Kelsey agt. Ward* 16 *Abb.* 98.)
3. In an action which formerly would have been tried in a court of equity, a dismissal of the complaint upon the merits, is a bar to a second action for the same cause. And this effect is not prevented by directing that the dismissal be without prejudice to a second action. (*Bostrick agt. Abbott*, 16 *Abb.* 417.)
4. In an action upon a money demand, where the defendants set up a *judgment* in their favor rendered by a court of concurrent jurisdiction for the same

cause of action, as a bar, it is competent to go behind the record of that judgment and show by *proof alibi*, that it was not given upon the merits, but on the ground that the action was *prematurely brought*, and therefore not a bar to the present action. (*Wicks agt Lee*, ante 418.)

See **ALIMONY**, 1. 2. 3.

ADMIRALTY.

1. A *master of a vessel*, although not the owner, may maintain an action in *his own name* to recover for the freight earned by her. (*Kennedy agt. Elton*, ante 197.)

ALIENS.

1. An *alien widow* cannot be endowed of lands of her husband, who was a naturalized citizen of the United States at the time of his death, where the marriage took place prior to the act of the legislature of this state, passed April 30, 1845, when both husband and wife were *aliens*, and the widow never having been a resident of this country. (*Greer agt. Saskaton*, ante 471.)
2. "Any woman being an *alien* who has heretofore married or who may hereafter marry a citizen of the United

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States, shall be entitled to dower in the real estate of her husband, within this state, as if she were a citizen of the United States." (*Laws* 1845, ch. 115, § 3.) (*Burton* agt. *Burton*, ante 474.)

8. "Any woman who might lawfully be naturalized under the existing laws, married or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen of the United States." (*Act of Congress*, Feb. 10, 1855, 10 *Stat. at Large*, p. 604, § 2.) (*Id.*)

4. Where the plaintiff, an *alien widow*, having married an alien prior to the passage of the act of the legislature in 1845, and never having resided in this country prior to her husband's death, *held*, that she had no *dower right* in the lands of which her husband died seized as a citizen of the United States. *Held*, also, that the act of congress of 1855 was designed for the benefit of an alien white woman, whether resident or not, married to a person who was at the time of the marriage a citizen of the United States. But if construed with liberality, it would only extend to an alien woman resident in this country, though married abroad to an alien, and who came to this country with him or followed him here, and in that way, or in one of these ways identified herself with the country of his adoption. (*Id.*)

ALIMONY.

1. *Alimony*, whether in an action for divorce or for a separation, cannot be claimed as a matter of right. It is wholly discretionary with the court. (*McDonough* agt. *McDonough*, ante 193.)

2. Where the wife has a judgment of the court in her favor against her husband for a separation from bed and board forever, and in which judgment the court made an allowance to her for a sum in gross, and declared that it should be in full satisfaction for her support and all alimony whatsoever, such judgment is a *bar to the claim for alimony* by the wife in a subsequent action for divorce brought by her husband against her for adultery, although she claims *affirmative relief* in her defense, charging adultery against her husband. (*Id.*)

3. But such judgment does not preclude her from obtaining a *counsel fee* to assist her in defending the suit for di-

vorce. And she may, upon *restitution* of the original sum allowed her in gross, renew her motion for temporary alimony, and also for a further *counsel fee*. (*Id.*)

AMENDMENT.

1. Where only part of an answer is demurred to, the defendant, under *leave to amend*, can only amend the defective portion of the answer, and cannot set up new *defences*; but he may add, to the part demurred to, anything which would strengthen the *defence as originally made*, even if such matter had from any cause been passed over and left unanswered in the first pleading. (*Fielden* agt. *Carelli*, ante 173.)

2. An amendment which will change the form and nature of the action from *tort* to *assumpsit*, cannot be allowed after the whole case is finished. (*Ranson* agt. *Wetmore*, 39 *Barb.* 104.)

ANSWER.

1. Where the plaintiff's attorney returned the answer of the defendant to his attorney, on the ground that the defendant told the plaintiff's attorney that he never swore to it, and entered judgment against the defendant as for want of an answer, held, that the judgment be set aside for irregularity, with \$10 costs. (*Chadwick* agt. *Snediker*, ante 60.)

2. Where only part of an answer is demurred to, the defendant, under *leave to amend*, can only amend the defective portion of the answer, and cannot set up new *defences*; but he may add, to the part demurred to, anything which would strengthen the *defence as originally made*, even if such matter had from any cause been passed over and left unanswered in the first pleading. (*Fielden* agt. *Carelli*, ante 173.)

3. An allegation in a complaint, not denied by the answer, stands admitted of record. (*Brotherson* agt. *Consalus*, ante 213.)

4. After issue joined, if other matters constituting a *defence* arise, they can be taken advantage of only by supplemental answer. Thus, in an action for partition of land brought by the grantee in the sheriff's deed after sale on execution, evidence, that after issue joined, the judgment under which the

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sale took place was vacated, is inadmissible unless it has been so pleaded. (*Williams agt. Hermon*, 16 Abb. 173.)

5. A partial defence, under the Code, may be set up by answer—As, in an action to recover damages for assault and battery and false imprisonment, facts constituting a justification of a portion of the violence complained of, or facts in mitigation of damages, constitute a sufficient defence. (*Foland agt. Johnson*, 16 Abb. 236.)

6. Any defence which a party could have pleaded *peis derrien* *continuance* as a matter of strict right, he should be allowed to set up by supplementary answer. If the defendant be guilty of laches, it is in the discretion of the court to receive the plea or not. A defendant has been permitted to plead his discharge *pusi*, after the time limited. But the plea must be true and contain a good defence. The truth of it may be inquired into on a motion for leave to interpose it. (*Morel agt. Garelli*, 16 Abb. 269.)

7. The allegation of a defendant, brought in by supplemental complaint, of his ignorance as to a fact admitted by the answer of the original defendant, to whose interest he has succeeded, does not put such fact in issue. (*Forbes agt. Waller*, 25 N. Y. R. 430.)

See **COMPLAINT**, 6.

See **DIVORCE**, 2.

See **IRRELEVANT MATTER**, 1.

See **FALSE IMPRISONMENT**, 4.

APPEAL.

1. No undertaking is necessary on an appeal from the *special term* to the *general term* of this court, to sustain the appeal. (*Niles agt. Baitershall*, ante 93.)

2. But if a *stay of proceedings* is desired by the appellant, he must either obtain an *order of court* for that purpose, or he must file and serve, with the *notice of appeal*, a copy of an *undertaking* as required on an appeal to the court of appeals. (*Id.*)

3. Where a cause has been tried at the circuit, and a verdict and judgment rendered for the plaintiff; and from that judgment the defendants appeal to the general term, and obtain an order for a *new trial*; and from that order the plaintiff appeals to the court of appeals; which court make an order reversing the judgment of the

general term, and directing *judgment to be entered on the verdict*; and thereupon, on filing the remittitur, an order is entered in the court below making the judgment of the court of appeals the judgment of the court below, *held*, that the court below have no right to go behind that *judgment and inquire into its regularity*. If, as the defendants contend, the verdict was subject to an adjustment, and that adjustment had not taken place, they should have applied to the court of appeals to correct it when the cause was in that court. (*Griswold agt. Haven*, ante 170.)

4. An *error*, that the amount of the judgment exceeded the amount of the verdict and interest, could be corrected on *special motion in the court below*. (*Id.*)

5. On an *appeal* from an *order of sale and reference*, where a receiver has been appointed and has possession of the property, a *stay of proceedings pending the appeal* will be granted, where it appears the case is soon to be tried on the merits, when a reference may be dispensed with. (*Clark agt. Brooks*, ante 277.)

6. An order denying a motion to set aside a judgment for irregularity, also for leave to come in and defend, is not appealable, as to that part denying leave to come in and defend. And where the notice of motion does not specify the irregularity complained of, the court on appeal, will presume that the motion was denied for that reason. (*Lewis agt. Graham*, 16 Abb. 126.)

7. An appeal from an order which has not been entered, as required by §§ 349-356, of the Code, nor served as made, will be dismissed. (*Plato agt. Kelly*, 16 Abb. 188.)

8. On appeal from a judgment rendered on a trial by the court without a jury, the case must show, not only the facts on which the grounds of the defendant's liability rest, but also the facts on which the particular sum for which judgment was rendered depends. (*Watson agt. Barker*, 16 Abb. 203.)

9. When an appeal has been determined by the court of appeals, the court below will not order the filing of the remittitur to be stayed upon affidavit of the applicant that he intends to apply to the appellate court for a *reargument*, and giving grounds therefor. But where a judge of the appellate court

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grants an order that the adverse party show cause why a reargument should not be had, and directing that in the mean time the remittitur be stayed if it had not been sent down, the court below may properly order that the filing of the remittitur be stayed pending the application to the appellate court, even though the remittitur had been sent down when the order to show cause was made. (*Jarvis* agt. *Shaw*, 16 Abb. 415.)

10. An appeal from an order denying a motion to vacate an order of arrest, is not prejudiced by the entry of judgment against defendant, and the bail becoming charged pending the appeal. (*Pacific Mu. Ins. Co.* agt. *Shaw*, 16 Abb. 415.)

11. An agreement by the vendor of chattels to transport them to a place named for delivery, does not render executory a contract of sale otherwise completed, on his part. Accordingly, where, on a sale of lumber then in the vendor's yard, the pieces sold were selected and designated, and the price paid, but the vendor agreed to deliver the lumber at a railroad station, the lumber being destroyed by fire before such delivery, *held*, that the loss was that of the purchaser. The refusal of a court, trying an issue without jury, to consider the testimony, as conflicting, or to pass upon the credibility of witnesses, raises no question reviewable in this court. (*Terry* agt. *Wheeler*, 25 N. Y. R. 520.)

See **REFERRERS and REPORTS**, 1. 2. See **NEW TRIAL**, 1. 2. 3.

See **NOTICE OF APPEAL**, 2. 3.

See **FALSE IMPRISONMENT**, 1. 2. 3.

See **HIGHWAYS**, 4. 5.

See **STAT OF PROCEEDINGS**, 2.

See **UNDERTAKING**, 3. 4.

See **NEW TRIAL**, 5. 6. 14. 15. 16.

See **SURETY**, 3. 4.

ARREST.

1. To justify an order of arrest on the ground of a fraudulent disposition of property, proof of an actual fraudulent intent is required. (*Pacific Mu. Ins. Co.* agt. *Machado*, 16 Abb. 451.)

2. The fact that an assignee for the benefit of creditors is misappropriating the proceeds of the assigned estate with the knowledge and assent of the as-

signor, who is acting as agent for the assignee, is not proof of a fraudulent disposition of property by the assignor within the meaning of § 179 of the Code, which authorizes arrests. (*Id.*)

See **JUSTICES' COURTS**, 7.

ASSESSMENTS.

1. The power of commissioners, in a street assessment, extends only to known, ascertained and fixed expenses. All others are illegal and void. Thus, where the estimate of the expenses of an assessment, after enumerating specifically various items, amounting in the aggregate to \$1,216.74, contained a charge of \$460.05 for "contingencies," *held*, that the insertion of this item rendered the assessment illegal and void. Effect of the extension of time for the completion of a job of work by the trustees of a village, upon prior proceedings had after the awarding of the contract, &c. (*People* agt. *Village of Yonkers*, 39 Barb. 266.)

ASSIGNMENT.

1. An *assignment of a judgment*, upon a condition of being reassigned in case it cannot be *set off*, does not transfer the ownership of it with sufficient absoluteteness to enable the assignee to set it off by analogy. (*Butler* agt. *Niles*, ante 61.)

2. And an assignment of a judgment, upon condition of a rescission of the transfer, in case the assignee cannot avoid a *set-off*, cannot be a transfer absolute enough to evade it. (*Id.*)

3. In an action to set off judgments by the plaintiff as assignee of the judgment, he cannot, even if entitled to set off his judgment against that of the defendant, make use of it to defeat the incidental claims for costs growing out of any legal proceedings to collect the defendant's judgment, instituted before the assignment of the plaintiff's judgment to him. (*Id.*)

4. A *cause of action* for damages for the fraud and deceit of the defendant in the false reading of the hour of appearance named in a summons served upon the plaintiff's assignor in a justice's court, by means of which a judgment was obtained against him without any defence, is not assignable. (*Lamphere* agt. *Hall*, ante 508.)

See **MURKIN**, 1. 2. 3. 4.

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See CORPORATIONS, 2.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

See ATTORNEY, 11.

See GUARANTY, 4.

See BILLS OF EXCHANGE and PROMISSORY NOTES, 11.

ASSIGNMENT FOR THE BENEFIT OF CREDITORS.

1. A general assignment for the benefit of creditors, must be acknowledged or proved in pursuance of the act of 1860, or it is void. (*Fairchild* agt. *Gwynne*, 16 Abb. 23.)
2. A general assignment for the benefit of creditors by an infant, or by a partnership, one of whose members is an infant, is void as against creditors. (*Fox* agt. *Heath*, 16 Abb. 163.)
3. In an action by a creditor to set aside the assignment of a partnership as fraudulent, the defendants are not estopped from proving that a party to the assignment, and therein declared to be a member of the firm, was not so in fact. An estoppel must be reciprocal; both parties must be bound by the recital, or neither is. (*Id.*)
4. A creditor cannot avoid an assignment made by his debtor, merely on the ground that it contains a provision which is illegal, if such provision is advantageous and not injurious to him. A party to have a standing in court, must show himself to be injured by the acts complained of. (*Id.*)
5. The courts of this state will not recognise a claim or title, under foreign statutory bankrupt proceedings to property in this state, or to debts owing by debtors residing within this state, as against a domestic attaching creditor. And the same principle will be applied in favor of one who has obtained a lien in equity, as by injunction, upon the assets of the foreign bankrupt. (*Matter of Bristol*, 16 Abb. 184.)
6. Where a creditor receives an assignment of property, providing for his own security as well as the security of other debtors, but who repudiates the trust by insisting that the assignment to him was absolute, and refuses to pay other creditors, out of the surplus, is not entitled to any commissions as a trustee, upon its being established by a creditor that he is a trustee. And an

assignee for the benefit of creditors, who compromises debts for less than the whole sum due, is entitled, as against other creditors, to be allowed only the amount actually paid. (*Irland* agt. *Potter*, 16 Abb. 218.)

7. The refusal of an assignee for benefit of creditors to file an inventory and give a bond, as required by the laws of 1860, does not render the assignment void. But such refusal would justify the removal of the assignee. (*Barbour* agt. *Everson*, 16 Abb. 366.)
8. An assignment for the benefit of creditors, containing a provision that the assignee, out of the proceeds of the assigned property, "protect, save harmless and indemnify the party of the second part of and from the payment of any sum, by reason of his having executed a covenant of suretyship, for the payment by the assignors of certain rents, amounting to \$3,500 a year, payable quarterly, covered by a lease then having about four years to run," does not invalidate the assignment. (*Loeschigk* agt. *Jacobson*, ante 526.)
9. When an assignment for the benefit of creditors is valid when made, and vests the title in the assignee, neither the omission of the assignor to deliver an inventory within twenty days, nor of the assignor to give a bond for the faithful discharge of his duties in thirty days, under the act of 1860—which is directory merely, nor any omission of duty by the assignee in the execution of his trust, will reach back and render the assignment invalid. (*Julian* agt. *Rathbone*, 39 Barb. 97.)
10. Where it is found that the composition deed, and the assignment for the benefit of creditors, were separate and distinct transactions, and were not part of one original plan or agreement, or to be construed with reference to each other, a provision in the assignment reserving nothing to the assignors, and containing no provisions that the law holds sufficient to vitiate it, is not to be adjudged fraudulent and void because of a clause preferring the creditors who had signed the composition deed, agreeing to take fifty cents on the dollar and release the assignors. (*Renard* agt. *Graydon*, 39 Barb. 548.)

See ARREST, 2.

See PARTNERS and PARTNERSHIPS, 2. 4.

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ATTACHMENT.

1. Where an attachment is issued to the sheriff, he has a right to seize any property the defendants have disposed of, in any manner, with intent to defraud their creditors. (*Rinchey agt. Stryker, court of appeals, ante 75.*)
2. And the plaintiff in the attachment suit is not to be deemed a mere creditor *at large*, after his attachment has been served, but a creditor having a specific lien upon the property attached; and the sheriff, as the bailee of the plaintiff, has a like lien; and on the trial in an action against the sheriff for wrongfully taking the property, he has a right to show, *before judgment in the attachment suit*, that the title of the purchaser from the debtors was fraudulent and void as against the attaching creditor. (*Id.*)

See COSTS, 1.

See ASSIGNMENT FOR THE BENEFIT OF CREDITORS, 5.

See SHERIFF, 4. 5.

ATTORNEY.

1. An allegation in a complaint, not denied by the answer, stands *admitted of record*. (*Brotherson agt. Con-salus, ante 213.*)
2. The purchase of a judgment by an attorney, for the purpose of enforcing it by execution, is not a violation of the statute which prohibits attorneys from buying choses in action with the intent and for the purpose of bringing suits thereon. (*Id.*)
3. This prohibition is not limited to suits at law, but extends to actions in equity. (*Id.*)
4. An agreement by an attorney, on commencing an action, that he will indemnify the client against the costs which may be recovered against him therein, is void for *chancery and maintenance*, notwithstanding section 303 of the Code of Procedure. (*Id.*)
5. While the relation of attorney and client continues, the court will carefully scrutinize the dealings and contracts between them, and guard the client's rights against every attempt by the attorney to secure any advantage to himself at the expense of the client. (*Id.*)
6. Nor is it necessary in such case for the client to show actual, or, as it is some-

times called, active fraud, in order to obtain relief; but the law will presume in his favor as soon as the confidential relation is shown to have existed at the time of the transaction complained of. (*Id.*)

7. An attorney, who purchases the subject matter of the litigation from his client's adversary in the suit, will be deemed to have purchased *in trust* for his client at his election. (*Id.*)
8. The disability of an attorney to purchase a demand against his client, as to which he has been retained and consulted, and to hold it for his own benefit, will continue *after the confidential relation has ceased*. (*Id.*)
9. In such case, the attorney is entitled to hold and enforce the demand only for the sum advanced on its purchase. (*Id.*)
10. These consequences result from an application of principles of *preventive injury*, which often attach to innocent transactions with the same legal effect as if the transactions were in fact unjust and fraudulent. (*Id.*)
11. Where a merely colorable transfer of a thing in action, for the purpose of ostensibly disconnecting the real party in interest, and of prosecuting an action on it in the name of one who has no interest, it is fraudulent and illegal. And where such a transfer is shown to have been procured by the assignee while acting as attorney for the assignor, and by advice given in that capacity, and for the purpose of suing in his own name, equity requires that it should not be enforced, or if it has been executed, that it should be rescinded on the application of the client. The provision of the Code which leaves the compensation of attorneys to be fixed by agreement with the client, does not alter the rules as to the validity of purchases by attorneys from their clients. (*Anonymous, 16 Abb. 423.*)

See SET-OFF, 1.

BANK CHECKS.

1. The party making and uttering a certificate of "good," written upon the face of a bank check or other negotiable paper designed for circulation, stands in the relation of an *acceptor*, with all the responsibilities incident to that relation. The certificate means nothing less than this, but it means something

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more. It imports that the drawer has funds, or means convertible into funds, in the hands of the drawee at the time, which shall be retained and devoted to the payment of the paper on presentation. (*Farmers' &c. Bank agt. Butchers & Drovers' Bank, court of appeals*, ante 1.)

2. Therefore, where the teller or other proper officer of a banking corporation, representing it and doing its business at the counter, certifies checks of its dealers and depositors drawn upon it in the usual form under a general power to certify, such banking corporation is responsible to holders in good faith and for value, notwithstanding private directions not to certify in the absence of funds without special permission. (*Id.*)

3. Where a creditor accepts his debtor's bank check for the amount due him, he is not entitled to recover upon his original claim, unless the check has been dishonored, without showing affirmatively that the debtor has sustained no damage by a failure to present the check for payment. Presenting a check at the bank to be certified, is not equivalent to a demand of payment. (*Bradford agt. Fox*, 16 Abb. 61; *S. C. 39 Barb.* 203.)

4. The certification of a check as good, by the authorized officer of a bank is equivalent to the acceptance of a bill of exchange payable on demand, and makes the bank primarily liable to the holder until discharged by payment, release, or the statute of limitations. (*Meads agt. Merchants' Bank*, 25 N. Y. R. 143.)

See **PRINCIPAL AND AGENT**, 1. 2. 3.
4. 5. 6. 7. 19.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 14.

BANKING CORPORATIONS.

1. The sale, at a discount, by one banking association to another, for the purpose of effecting their redemption, of Canada bank bills under the denomination of five dollars, received by the former, not in payment of debts, but at a discount allowed by chapter 223 of 1858, was not a violation of chapter 295 of 1830. The bank could send them home for redemption itself, or employ another to do it. This is not passing, issuing, uttering or circulating them, within the sense of either of

those statutes. (*Buffalo City Bank agt. Codd*, 25 N. Y. R. 163.)

2. Where the selling bank takes in payment a time draft made by the purchasing bank, this is not a discount or loan by the seller, in violation of chapter 355 of 1839, section 3; and the issuing such draft is a violation of chapter 251 of 1850 only on the part of the purchaser. The seller may surrender the illegal draft, and recover, as upon an implied assumption, the value of the bills as measured by the discount agreed upon. (*Id.*)

3. As against one who has dealt with a banking association, organized as such under the general law, its incorporation is sufficiently proved by the recording of its articles in the county clerk's office, and its user of corporate powers under color of incorporation, without proof that the articles were filed in the banking department. (*Leonardsville Bank agt. Willard*, 25 N. Y. R. 574.)

4. Such association may sue in its corporate name, as well as in the name of its president. (*Id.*)

5. The acceptance by a corporation of a charter whereby, upon its committing an act of insolvency, all its property is to vest forthwith in receivers, to be distributed in a prescribed mode, does not give to the transfer thus effected the character of a voluntary conveyance. (*Willitts agt. Waite*, 25 N. Y. R. 577.)

6. Held, accordingly, that the receivers of an Ohio bank, organized under such a charter, took its assets in this state subject to the claims of creditors who had attached them subsequent to the act of insolvency. (*Id.*)

7. It was not the intention of the act of April 5, 1849, to enforce the responsibility of stockholders, &c., or of the constitution, that stockholders should be reimbursed any portion of their contributions, until the debts of the corporation were extinguished; but, on the contrary, it was designed to make the stockholders liable to the creditors, to the full extent of their stock, until the debts are completely satisfied. (*Pruyn agt. Van Allen*, 39 Barb. 354.)

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 3. 4. 5. 6. 7. 8.

See **PRINCIPAL AND AGENT**, 19.

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Where a *promissory note* given to and payable to the order of an *insurance company*, is transferred before maturity to the *president* (by indorsement of the *secretary*), without any previous authority of the *board of directors*, as required by the statute relative to *moneyed corporations* (1 R. S. 598, § 51, L. 1844, 229, and L. 1855, 505), the *president* obtains no title to the note, and is subject to the penalties prescribed by the statute for such unlawful taking. (*Houghton* agt. *McAuliffe*, *court of appeals*, *ante* 270.)
2. Such a note being the property of the company, and having been transferred or assigned unlawfully, it is *prima facie void* in the hands of an *assignee or holder*; and he must show that he purchased it for a valuable consideration, and without notice of the facts which the statute declares render the transfer void and illegal, in order to sustain his action upon it. (*Id.*)
3. The certification of a check as good by the authorized officer of a bank is equivalent to the acceptance of a bill of exchange payable on demand, and makes the bank primarily liable to the holder until discharged by payment, release, or the statute of limitations. (*Meads* agt. *Merchants' Bank*, 25 N. Y. R. 143.)
4. So of the certification as good of a promissory note payable at the bank, where the course of business between banks is, instead of actually paying the notes of customers when in funds on presentment, to mark them as good and settle in the exchanges of next day. Such certificate is an absolute engagement to pay the bank's own debt, and not a *guaranty* or promise for the benefit of a third person. (*Id.*)
5. When a note is thus certified by the teller falsely, the bank not having funds for its payment, it is liable only to a holder in good faith and for value. (*Id.*)
6. A holder who, ignorant of the falsity of the certificate, treats it as payment, and omits to charge an indorser, is entitled to recover. (*Id.*)
7. His delay, at the request of the maker of the note and for his accommodation, after its certification, to obtain actual payment, does not discharge the obligation arising from the certificate. (*Id.*)
8. It is a sufficient demand of payment of a note that the same was left for collection at the bank where it was payable, on the last day of grace, and the maker having no funds, it was returned to the holder before the expiration of the last business hour. (*Merchants' Bank* agt. *Elderkin*, 25 N. Y. R. 178.)
9. The indorsee of a note, for a consideration not to be paid till the note should be collected, is the real party in interest to maintain an action thereon. (*Cummings* agt. *Morris*, 25 N. Y. R. 625.)
10. Where a non-negotiable promissory note was signed by two persons, and a third person wrote his name across the back, and it was thereupon transferred to the payee, who gave full consideration therefor—the note having been in fact made to obtain such consideration, *held*, that the person who wrote his name upon the back was a joint promisor with the other signers—the precise locality of his signature was not material. The Code has not abrogated the distinction that existed in the law merchant, between negotiable and non-negotiable paper. (*Richards* agt. *Warring*, 39 Barb. 42.)
11. Where a draft is drawn upon a fund in the hands of a third person and accepted by the drawee, this operates as a valid equitable assignment of the fund to the holder, and entitles him to hold it, as against all persons not having a prior or a better equity. (*Wells* agt. *Williams*, 39 Barb. 567.)
12. Promissory notes made and indorsed by a person without consideration, as merely accommodation paper, for another to enable the latter to take up and renew another like note, made and indorsed by the same person for the benefit of the holder, who diverts from the original purpose, and transfers them to a bank to pay a prior indebtedness of the holder to the bank, but the bank claims to hold as collateral security for the prior debt of the holder, no action can be maintained by the bank on the accommodation notes so received. (*Ocean Bank* agt. *Dill*, 39 Barb. 577.)
13. Whatever may be the intention of the parties as to taking a new note or draft as collateral security to a previous note past due, yet if the time of payment is extended on the previous note until the maturity of the new

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note, the indorser on the old note is discharged. (*Dorlon agt. Christie, 39 Barb. 610.*)

14. Where W. draws his check, payable to the order of L., which is indorsed by P. and negotiated to L. by W. in payment for property sold, and is subsequently indorsed by L. and is passed away, and protested for non-payment, L. cannot maintain an action against P. upon the check. The legal intentment is, that P. only intended to become liable as second indorser, and subsequent to the payee; and that he indorsed the paper with the understanding that the payee was to be the first indorser. (*Lester agt. Pates, 38 Barb. 616.*)

15. A promissory note past due and protested for non-payment, although it passes by delivery, and an action may be maintained upon it, by the holder, subject to the equities of the parties thereto, cannot be said to pass in the usual course of trade and business. And although such paper will pass by delivery, and the holder may maintain an action upon it, yet the substantial elements of commercial paper for the purposes of trade are wanting, in the absence of an unqualified obligation of the parties to it to pay at maturity. The holder takes it in the light of an assignee of the person from whom he receives it, rather than as an indorsee according to the usage of trade; and he, therefore, takes just such title, and no other, as his assignor had to it, at the time of the transfer. (*Farrington agt. Park Bank, 38 Barb. 645.*)

See GUARANTY, 1. 2. 3. 4.

See CONSIDERATION, 1.

See DEFENCE, 1. 2. 3. 4. 6. 7.

See USURY, 1.

See DAMAGES, 4.

BONDS.

1. *Railroad bonds, payable to A. B. or holder, at a particular place, are negotiable, passing by delivery, whether under seal or not, or whether or not indorsed by the payee.* (*Connecticut Mut. Life Ins. Co. agt. Cleveland &c. R. R. Co. ante 225.*)

2. The interest coupons upon such bonds are negotiable promises to pay a certain sum of money at a certain time, to the holder, so made as to be cut off and circulated independently of the bond; and

if not paid when due, interest may be allowed upon them by way of damages for the delay of payment. (*Id.*)

3. Where a *guaranty* of such railroad bonds is made by third persons by indorsement thereon, "for value received," the guaranty is not an *accommodation* guaranty or indorsement, but expresses a sufficient consideration upon its face. (*Id.*)

4. Where there is a state law authorizing any two or more railroad corporations created under the laws of such state, whose lines are connected, to enter into any arrangement, to aid in the construction of any road requiring it, by subscription to its capital stock or otherwise, for their common benefit, it authorizes the *guaranty* of the bonds issued by such corporation to be made by any other corporation who is party to the arrangement. (*Id.*)

5. Where a law of another state declares that no *director* of a railroad company shall purchase any of the bonds of any railroad of which he may be a director, for less than the par value thereof, and that all such bonds, &c., so purchased shall be void, and the supreme court of that state have decided that certain railroad bonds alleged to have been purchased in violation of this act are valid securities, and upon which the holders are entitled to recover the full amount of principal and interest, without reference to the amount paid for them, the courts of this state, where that question arises, will consider it settled by such decision. (*Id.*)

6. *Guarantors* of railroad bonds may be liable independently of the question whether the bonds are void under a certain statute. (*Id.*)

7. Where the action is brought upon the bonds and coupons of a railroad corporation created in another state, but are payable in this state, the cause of action arises here, and this court has jurisdiction, though both parties are foreign corporations. (*See S. C. 23 How. Pr. R. 180.*) (*Id.*)

8. The bond of a railroad corporation, payable to A. B., or his assignee, is in the nature of commercial paper, negotiable by delivery under an assignment in blank, and not a specialty, subject to equities between the corporation and the person named in the bond as the primary payee. (*Brainerd agt. N. Y. and Harlem R. R. Co. 25 N. Y. R. 496.*)

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CALENDAR.

1. After a judgment entered *absolutely*, a motion for a new trial on a case or exceptions cannot be heard at *special term*. (*Anderson agt. Dickie*, ante 199.)
2. If the judgment is to be reviewed on appeal at general term on a case or exceptions, the appellant must procure an *order of the court* authorizing the case or exceptions to be annexed to and to form part of the *judgment roll*. (*Id.*)
3. Until this is done, the respondent has a right to notice the cause for argument and put it on the calendar of the general term, *before the expiration of the time for filing the case or exceptions*, after settlement. (*Id.*)

CASE.

1. Under the 37th rule of this court, the moving party must, within ten days after settlement of the case, file with the clerk of the court a *copy of the case as settled, and the original papers* containing the case and amendments as they came from the judge or referee. (*Parker agt. Link*, ante 375.)
2. On appeal from a judgment rendered on a trial by the court without a jury, the case must show, not only the facts on which the grounds of the defendant's liability rests, but also the facts on which the particular sum for which judgment was rendered depends. (*Watson agt. Barker*, 16 Abb. 203.)

CAUSE OF ACTION.

1. A *cause of action* for damages for the fraud and deceit of the defendant in the false reading of the hour of appearance named in a summons served upon the plaintiff's assignor in a justice's court, by means of which a judgment was obtained against him without any defense, is *not assignable*. (*Lamphere agt. Hall*, ante 509.)
2. A judgment under the Code (§ 274) must, as before, be based upon the pleadings, and is not to be given in favor of a defendant for a cause of action which he has not set up by way of defense or counter-claim. (*Wright agt. Delafield*, 25 N. Y. R. 266.)
3. The complaint sought to restrain the prosecution of actions pending against the plaintiff on notes given for the purchase of land, on the ground of defect

of title, and prayed that the defendant might be required to make a good title and convey. There was a pure defense, which prevailed. *Held*, that the complaint should have been dismissed, and a judgment for the defendant for the amount of the notes was reversed. (*Id.*)

4. Money paid by a person charged as the father of an unborn bastard to a superintendent of the poor, upon a compromise, under chapter 26 of 1832, may be recovered back upon its appearing that the supposed mother was not in fact pregnant. (*Rheel agt. Hicks*, 25 N. Y. R. 289.)
5. It is no defense by the superintendent that he paid the money into the county treasury, no expense having been incurred in the support of the expected child or mother. (*Ib.*)
6. An action will not lie to restrain the collection of a tax, on the bare ground that the assessment was illegal. There must be, in addition, facts bringing the case under some acknowledged head of equity jurisdiction. (*Susquehanna Bank agt. Supervisors of Broome Co.* 25 N. Y. R. 312.)
7. In an action for a *tort* in wrongfully taking and converting property, where there is an entire failure of proof that the taking was wrongful or tortious, or that there was any fraudulent intent, the plaintiff should be non-suited. He cannot at the close of the case waive the *tort* and recover as upon contract. An amendment which will change the form and nature of the action from *tort* to *assumption*, cannot be allowed after the whole case is finished. (*Ransome agt. Weimore*, 39 Barb. 104.)

See COMPLAINT, 8.

See CONTRACTS, 17. 18.

See LANDLORD and TENANT, 7. 8. 9.

See COMMON CARRIERS, 1. 2.

See EXECUTORS and ADMINISTRATORS, 4.

See BILLS OF EXCHANGE and PROMISSORY NOTES, 12.

CERTIORARI.

1. It is competent for *any parties* to join as *relators in a certiorari*; and if it appears from the return that the officer had *no jurisdiction*, it is immaterial how that fact was shown, or by whom the objection was made. (*People ex rel. Lord agt. Robertson*, ante 90.)

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2. Upon a common law certiorari, only the record can be the ground of proceeding; and affidavits and other papers which may be annexed to the return, are not properly before the court. It is not the practice to grant a certiorari to relieve against fraudulent assessments by a municipal corporation for local improvements. The injured party must be left to his remedy by action. (*Matter of 86th Street*, 18 *Abb.* 169.)

3. Under the laws of 1840 (p. 327) and 1844 (p. 402) costs are distinctly allowed on every certiorari. (*People ex rel. Cook agt. Board of Metropolitan Police*, ante 450.)

COMMISSIONS.

See GUARDIAN, 3.

COMMON CARRIERS.

1. A warehouseman at Buffalo was also a carrier on the Erie canal, and used to receive freight from the west and forward it to the east by the first boat going, whether his own or that of other carriers. He received goods shipped from Detroit addressed to his care at Buffalo and marked "to go from Buffalo to East Albany, at 30 cts. per 100 lbs." The presumption from these facts alone is that the goods came to his possession as a carrier, and having been burned without his fault while in his warehouse awaiting transportation, he is liable for their value. (*Ladue agt. Griffith*, 25 *N. Y. R.* 364.)

2. Public policy in this country of long routes and frequent transhipments forbids any intendment which would favor an intermediate carrier in divesting himself of that character and assuming the more limited responsibility of a forwarder. (*Id.*)

See RAILROADS.

COMPLAINTS.

1. It seems, that where it appears on the face of the complaint that the plaintiff brings suit here as a *foreign administratrix*, and the defendant does not take the *objection by demurrer* to the plaintiff's legal capacity to sue, it is waived, under §§ 144, 1847 and 148 of the Code. (*Robbins agt. Wells*, ante 15.)

2. A judgment dismissing the complaint at the trial, solely on the ground that the plaintiff has not legal capacity to sue, is not a *bar* to another action legally instituted by the plaintiff. But it is otherwise, if the judgment of dismissal is on the ground that the *action will not lie against the defendants*. (*Id.*)

3. The mere leave to file a supplemental complaint by the representative of a deceased plaintiff, decides nothing as to the plaintiff's rights. But a judgment that the plaintiff in it have leave to prosecute the original action and succeed to all the rights of the first plaintiff, is a different matter. Where the court can see on the face of the supplemental complaint that the former action is fatally defective, it may refuse such judgment. Per *ROBERTSON*, J. (*Id.*)

4. Although the technical rule is, that under a complaint setting out a contract, and averring its performance by the plaintiff, *evidence in excuse for non-performance is not admissible*, yet, under the Code, the plaintiff may *amend his complaint*, and then give the evidence. (*Hosley agt. Black, court of appeals*, ante 97.)

5. The old count of *indebitatus assumpit* for work and labor, was always sufficient to authorize a recovery for work and labor performed *under a contract not under seal*; and the Code has not changed the former rule of pleading, that a party who has *wholly performed a special contract* on his part, may count upon the *implied assumpit* of the other party to pay the stipulated price, and is not bound to *declare specially upon the agreement*. (*Id.*)

6. Where a complaint shows upon its face that the action was brought against two trustees, the objection that a *third trustee* should have been made a defendant is waived, if not taken by *demurrer or answer*. (*Id.*)

7. An allegation in a complaint, not denied by the answer, stands *admitted of record*. (*Brortherson agt. Consalus*, ante 213.)

8. As a condition precedent to a right of recovery by a party to a *judgment*, *leave to prosecute the judgment* must be obtained of the *court*. And without an *allegation* that such permission has been obtained, the complaint fails to show a *cause of action*. (*Graham agt. Scripture*, ante 501.)

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9. The allegation in a complaint that the defendant "falsely and fraudulently represented," is a sufficient statement of the scienter. (*Thomas agt. Beebe, 25 N. Y. R. 244.*)

10. A complaint, stating a promissory note, whereby the maker promised to pay the defendants named "trading and doing business under the partnership name or firm of C., I. & Co.," and that said note was "duly indorsed by said defendants by their said partnership name," sufficiently avers the partnership: an answer, denying "the indorsement in the complaint alleged," does not put the partnership in issue. (*Anable agt. Conklin, 25 N. Y. R. 470.*)

11. *Held*, accordingly, that evidence, offered by one of the defendants, that he was never a member of the firm of C., I. & Co., was inadmissible. (*Id.*)

See CORPORATIONS, 2.

See INJUNCTION, 5.

See DAMAGES, 2. 3.

See MARRIED WOMEN, 10.

See JOINT DEBTORS, 2.

See JOINT STOCK COMPANIES, 3.

See JUDGEMENT, 15. 16.

See TRESPASS, 1. 5.

CONSIDERATION.

1. A promise by a debtor that he will not pay a debt then past due until a future day named, and that he will then pay the same with interest, *held* not to be a good consideration for the promise of the creditor to extend the time for payment. (*Kellogg agt. Olmsted, 25 N. Y. R. 189.*)

See BILLS OF EXCHANGE AND PROMISSORY NOTES, 10.

CONSIGNMENT.

1. A letter to the consignee of cotton by the consignor, stating that he has drawn on the former for \$500, payable to a third person, when the cotton should be sold, is a specific appropriation to the use of the latter, payable on presentation of the consignor's order. (*Lowery agt. Steward, 25 N. Y. R. 239.*)

2. The consignee, upon receiving such letter, having promised the consignor and the payee to honor the draft from the proceeds of the cotton, is bound to retain the proceeds for that purpose. (*Id.*)

3. The draft not coming to the hands of the payee for several months, the consignor and consignee in the meantime agreed upon a new appropriation of the fund for the benefit of the latter: *Held*, that the obligation of the consignee to the payee was not discharged. (*Id.*)

CONSTITUTIONAL LAW.

1. The constitution of the United States has never invested the President of the United States, either in his civil capacity, or as commander-in-chief of the army and navy, with power to arrest or imprison, or to authorize another to arrest or imprison any person not subject to military law, at any time or under any exigency, without some order, writ or precept or process of some civil court of competent jurisdiction. (*Jones agt. Seward, ante 33.*)

2. And where an action for damages is instituted in a state court, which brings in question this power to arrest and imprison a citizen of such state, the state court has full power and jurisdiction over the subject. (*Id.*)

3. The charter of "The Chenango Bridge Company," which is in perpetuity, a toll-bridge, and without any reserved power to the legislature to alter or repeal it, contains this express provision: "That it shall not be lawful for any person or persons to erect any bridge or establish any ferry across the Chenango river within two miles either above or below the bridge erected by them." *Held*, that this provision was intended to operate as a mere restriction upon individuals, public officers and authorities, and other corporations, and was not intended to be or to constitute any restriction upon the sovereign authority of the state, and does not involve any surrender of the rights on the part of the legislature to grant, in its discretion, such other charters within the limits prescribed, as it may deem required by the public interests. (*Chenango Bridge Co. agt. Binghamton Bridge Co., court of appeals, ante 125.*) (See dissenting opinions in this case, ante 297.)

4. Consequently the grant, subsequently, by the legislature to "The Binghamton Bridge Company," to erect their bridge not less than eighty rods above the Chenango bridge, does not come within the prohibition of the constitution of the United States, which declares that "no state shall pass any

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law impairing the obligation of contracts." (*Id.*)

5. In an action against a civil officer of the United States for damages in causing the arrest and imprisonment of the plaintiff, where the defence interposed is, that such acts were done under and by the authority derived from the President of the United States, the defendant is entitled, by virtue of an act of congress passed March 3, 1863, entitled, "An act relating to *habeas corpus*, and regulating judicial proceedings in certain cases," to have the action removed into the circuit court of the United States. (*Jones agt. Seward*, ante 433.)
6. On an application by the defendant for the removal of such an action from the state court to the circuit court of the United States, the question is not whether the act of March 3, 1863, affords a valid defence to the action, but whether congress has the power to give the circuit court jurisdiction of the case. (*Id.*)
7. The defence in the case arises under an *act of congress*, and it is sufficient for the state court that the defence involves the construction and effect of such act, under the constitution of the United States; it therefore comes within the judicial power of the United States, and congress can confer upon the circuit court jurisdiction over it. (*Id.*)
8. Congress can give the circuit court of the United States *original jurisdiction* in any case to which their *appellate jurisdiction* extends. (*This decision reverses S. C. at special term*, ante 33.) (*Id.*)
9. The act of the legislature, of April 21, 1862, "to facilitate the closing up of insolvent and dissolved mutual insurance companies," is not unconstitutional and void, as impairing the right of trial by jury. (*Sands agt. Kimball*, 39 *Barb.* 108.)

CONTEMPT.

1. Under the act of 1840, the examination to obtain the deposition of an involuntary witness, on a motion in this court, must be taken before a *judge*; by the 401st section of the Code, as amended in 1862, such examination may be taken before a *referee*. The Code merely confers on the court an additional power to send the witness

before a referee; but does not repeal or modify the act of 1840. (*Clark agt. Brooks*, ante 254.)

2. The Revised Statutes expressly authorize courts of record to punish for *contempt* "all persons summoned as witnesses, for refusing or neglecting to obey such summons, or to attend or be sworn or answer as such witness." And where the witness who attends before the court in pursuance of such mandate, and is *duely sworn*, the court has power to require him to *answer* proper questions, on pain of contempt, whether the examination is conducted by the judge personally, or by counsel in his presence. (*Id.*)

See PARTIES, 8.

CONTRACTS.

1. A contract in writing was made as follows: "New York, September 25, 1855. Sold to Messrs. Reimers & Schmidt, seven hundred and thirty-three bags crude saltpetre, at fifteen cents per pound, cash, in bond, to arrive on board the ship *Arabellia* from Calcutta, bound to Boston. No guarantee made as to quality or time of arrival of said ship, to be taken when landed along side of the ship in Boston. (Signed), Babcock & Cox, Brokers." *Held*, that this is a mere *executory contract*, conditional on the arrival of the goods, and not a *transfer of title*. (*Reimers agt. Ridaer*, ante 385.)
2. *Held*, also, that the *purchasers* under this contract were not bound to accept a *less number* of bags of saltpetre than the contract specified. (*Id.*)
3. A contract made for the employment of an *agent or clerk*, at a specified salary for one year, is an entire contract, and cannot be lawfully terminated within the year without justifiable cause. (*McDonald agt. Lord*, ante 404.)
4. Where parties residing in different states, engaged together in business transactions, agree that their communications to each other shall be made by *telegraph*, it is, in effect, a *warranty* by each party that his communication to the other *shall be received*. (*Trevor agt. Wood*, ante 451.)
5. A communication is only *initiated* when it is *delivered* to the telegraph operator; it is *completed* when it comes to the *possession* of the party for whom it is designed. (*Id.*)

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6. The rule that has been established by the courts in respect to *contracts* made by letter sent through the mail, is not applicable to communications by telegraph. (*Id.*)

7. A contract required by the statute of frauds to be in writing, cannot be partly in writing and partly by parol. (*Wright agt. Weeks*, 25 N. Y. R. 163.)

8. Thus, a contract for the sale of land, where the writing fixed the price, but referred to "terms as specified," not in the memorandum, cannot be made good by parol evidence of the time agreed upon for payment. (*Id.*)

9. Whether the vendee can waive any credit and enforce the contract as one for present payment, *quare*. (*Id.*)

10. One who has agreed to build a house on the land of another, and has substantially performed his contract, but has not completely finished the house nor delivered it, when it is destroyed by fire, is liable to an action for money advanced upon the contract and damages for its non-performance. (*Tompkins agt. Dudley*, 25 N. Y. R. 272.)

11. A brewer sold "sufficient barley now in my brewery to make malt enough, to be made in the brewery, to pay" a sum then advanced by the plaintiff, to whom a delivery was made of a specific mass of barley more than enough for the payment. The plaintiff did not remove it, but it remained until the brewer sold his brewery and the contents, with notice of the facts and subject to the plaintiff's claim. The purchaser sold the barley to the defendant, and by his direction put it upon a railroad for transportation to the latter. Held: (*Wooster agt. Sherwood*, 25 N. Y. R. 278.)

12. The legal title and general ownership of the barley passed to the plaintiff. The transaction was an executed sale, in the nature of a mortgage. (*Id.*)

13. The purchaser with notice had no title as against the plaintiff and could convey none to the defendant, although the latter bought without notice. (*Id.*)

14. The apparent authority of the defendant's vendor, not having been conferred by the plaintiff, nor with his knowledge or assent, the defendant is not within the rule protecting, as a *bona fide* purchaser, him who deals with one to whom the real owner has given the *indicia* of power to sell. (*Id.*)

15. As against the defendant, the transfer was valid, without filing as a chattel mortgage. (*Id.*)

16. Where the plaintiff's son is hired by the defendant for two months, at \$15 per month, to work on his farm, and at the end of five days, the defendant discharges him, saying he don't want him any longer, the plaintiff can recover the full two months' wages. The defendant's son, on going to the plaintiff, saying "his father (defendant) had sent him to hire a hand," is a sufficient general authority to make such a contract of hiring. (*Decker agt. Hassel, ante* 528.)

17. An agreement by the vendor of chattels to transport them to a place named for delivery, does not render executory a contract of sale otherwise completed, on his part. (*Terry agt. Wheeler*, 25 N. Y. R. 520.)

18. Accordingly, where, on a sale of lumber then in the vendor's yard, the pieces sold were selected and designated, and the price paid, but the vendor agreed to deliver the lumber at a railroad station, the lumber being destroyed by fire before such delivery, held, that the loss was that of the purchaser. (*Id.*)

19. Where an individual is in possession of land, under a contract to purchase, and entitled to a conveyance on making the required payments, he is virtually the owner, and can sustain an action to recover damages for injuries to his interest in the property, incurred while in possession. And evidence of the value of the premises, and the cost of the buildings erected thereon, is competent for the purpose of showing the situation of the property, and attendant circumstances. (*Housell agt. Hammond*, 39 Barb. 89.)

20. A provision made by a contractor, in a contract between him and a sub-contractor, that he shall be entitled to retain in his hands a part of the earnings, as a protection against his liability to the persons employed by the sub-contractor, will not give to the latter, or his assignee, any right of action against the contractor personally, nor any lien on the fund itself. In the absence of an express agreement to that effect, there is no liability on the part of contractors upon public works to pay to sub-contractors the 20 per cent. reserved in the original contract, for the payment of laborers or mechanics who

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may be employed. (*Wells agt. Williams*, 39 *Barb.* 567.)

See CONSTITUTIONAL LAW, 3. 4.

See DAMAGES, 1.

See MORTGAGE, 1. 2. 3. 4.

See MORTGAGE FORECLOSURE, 3. 4.
5.

See PRINCIPAL and AGENT, 9. 10.
11.

See INJUNCTION, 6. 7. 8. 9.

See STATUTE OF FRAUDS, 4. 5.

CONVERSION.

1. To constitute a demand and refusal of evidence of a conversion, it is sufficient that the goods are in the possession of the agent of the defendant, and that the latter on demand, refuses to permit his agent to deliver. (*Chambers agt. Lewis, court of appeals*, 16 Abb. 433.)

See PARTNERS and PARTNERSHIPS,
11. 12. 13. 14.

See CAUSE OF ACTION, 7.

See EXECUTORS and ADMINISTRATORS, 4.

CORPORATIONS.

1. The powers of stockholders of a corporation end with the election of directors. They possess no powers in the management of the corporation, unless specially authorized so to do by their charter. Their acts without the action of the board of directors, would be inoperative. The charter of a corporation vests all its rights, powers and privileges in the board of directors. And where the statute authorizes a reduction in the number of directors, such reduction is to be made by the vote of the directors. The fact that a corporation has elected fewer directors than the charter requires, does not invalidate the election, where the charter authorizes the board to fill vacancies. (*Matter of the Excelsior Fire Ins. Co.*, 16 Abb. 8.)

2. Where an assignee of assets of a corporation brings an action, when the transfer to him can be presumed to be legal, the complaint need not aver that the directors by resolution authorized the assignment, as prescribed by statute. (*Nelson agt. Eaton, court of appeals*, 16 Abb. 113.)

See JOINT STOCK COMPANIES.

See MUNICIPAL CORPORATIONS.

See EXPRESS COMPANIES.

See BANKING CORPORATIONS.

See RAILROADS.

See ASSESSMENTS, 1.

COSTS.

1. A plaintiff is not entitled to an *extra allowance of costs*, on obtaining judgment against the defendant, although an attachment was issued in the action and served upon the defendant, where the defendant shows that the attachment pending the action was *set aside and vacated*. (*Ielin agt. Graydon, ante* 95.)

2. Since the amendment of the 307th section of the Code, in 1858, there has been and is no limitation to the number of term fees in the court of appeals, taxable under subdivision 7 of that section. (*This agrees with Adams agt. Perkins, 25 How. Pr. R. 368.*) (*Shord agt. Dwight, ante* 163.)

3. Costs are always granted on affirming an order on appeal, in the New York superior court. (*Purchase agt. Bellows, 16 Abb. 105.*)

4. The value of the property to be directly affected by the result of an action, affords a proper basis for computing the percentage authorized by section 309 of the Code, as an allowance in addition to costs, in difficult and extraordinary cases. (*People agt. Albany and Vermont R. R. Co.*, 16 Abb. 465.)

5. When the plaintiff unites in the same action, a claim which is *not disputed* with one that is, the defendant, under section 385 of the Code, may remove from the controversy the undisputed claim, by the *offer* provided for under this section, and thus make the *subsequent costs* depend upon the result of the litigation in regard to the *disputed claim*. But the offer must be fully equal to the sum actually and really due to the plaintiff, or he is not bound to accept it. (*Budd agt. Jackson, ante* 398.)

6. The "more favorable judgment" mentioned in section 385, which the plaintiff must recover to entitle him to costs, does not mean, in the case of a money demand upon which interest is accruing, a sum greater at the time of the report or verdict than the sum offered. If the verdict or report is made up of principal and the interest

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which accrued thereon, in determining which is most favorable to the plaintiff, the interest which accrued intermediate the time of the offer and the time of the rendition of the judgment, is to be rejected therefrom. (*Id.*)

7. Thus, in this case, the sum named in the written offer was \$357.44, and the sum found due the plaintiff by the referee was \$377.17, being \$19.73 in excess of the sum expressed in the offer, but as this excess was not equal to the interest from the time of the offer to the date of the report, the plaintiff failed to obtain a more favorable judgment. (*Id.*)
8. Under the laws of 1840 (p. 327) and 1844 (p. 403) costs are distinctly allowed on every *ceteriorari*. (*People ex rel. Cook agt. Board of Metropolitan Police, ante* 450.)

9. The want of jurisdiction of the court over the subject matter of the action, will not prevent the defendant from recovering costs, on the dismissal of the complaint. (*Cumberland Coal and Iron Co. agt. Hoffman Steam Coal Co.*, 39 Barb. 16.)

10. Where in an action for assault and battery, the judge charges the jury as to the effect of their verdict on the question of costs, in case they should find for the plaintiff, and refuses to charge them that in arriving at the amount of the verdict they would give the plaintiff, they have nothing to do with the question of costs, or whether or not their verdict will entitle him to costs, the charge is correct. (*Wagstaff agt. Dillenbeck*, 39 Barb. 123.)

See ATTORNEY, 1. 2. 3. 4. 5. 6. 7.
8. 9. 10.

See SHERIFF, 3.

COUNTER CLAIM.

1. The accommodation indorser of a note given for chattels sold cannot, at law, avail himself of a breach of warranty as to the quality of such chattels, by way of defence, recoupment or counter claim. (*Gillespie agt. Torrance*, 25 N. Y. R. 306.)
2. Such a defence does not rest upon a failure of the consideration of the contract on which the action is founded, but is the setting off of one distinct claim against another. (*Id.*)
3. In such case, it is the right of the

principal to set up a counter claim, if sued, or bring his separate action, and the surety cannot make the election for the principal, or do anything to impair his right of recovery in a separate action. (*Id.*)

4. It seems that the surety would be relieved in equity, in case of the insolvency of the principal: *Per Selden, J.* (*Id.*)

See DEFENCE, 5. 6. 7.

See LANDLORD and TENANT, 14.

See DAMAGES, 4.

COUNTY CLERKS.

1. The statutes of this state, requiring county clerks to keep open their respective offices during certain hours each day for the transaction of business, were intended, not only to compel the clerks to be at their offices during those hours, but to prescribe rules and regulations which should control the office where the business was transacted. (*France agt. Hamilton, ante* 180.)
2. Therefore, all judgments filed and docketed by a clerk out of office hours, although some may be entered before others, must take effect and become liens equally at the next office hour after such docketing. (*Id.*)
3. This rule does not apply to executions delivered to sheriffs; for business with sheriffs may be transacted at other places besides their offices, and outside of office hours. (*Id.*)

COURT OF GENERAL SESSIONS.

1. Where the term of the court of general sessions for the city and county of New York is continued beyond the time prescribed by statute (2 R. S. 217, § 31), by reason of the unfinished trial of a case, commenced during the regular term—which continuation is provided for by a statute of 1846 (Law of 1846, p. 4)—any prisoners convicted during the term may be legally sentenced by the court during its session for such unfinished trial. (*Löwenberg agt. People, court of appeals*, ante 202.)

See CRIMINAL LAW, 2. 3. 4. 5.

CREDITOR'S BILL.

1. It seems that an action in the nature of a creditor's bill is maintainable upon

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the return of an execution before the expiration of sixty days from its delivery to the sheriff. (*Forbes agt. Waller*, 25 N. Y. R. 430.)

2. It is immaterial that such return was made at the request of the plaintiff. To constitute a defence, the plaintiff must, by collusion with the sheriff, have procured a return of *nolla bona*, without an attempt in good faith to find goods subject to levy. (*Id.*)
3. Whether such a defence is available to one claiming as assignee of all the debtor's goods, before the issuing of the execution, *quare.* (*Id.*)

CRIMINAL LAW.

1. Where the term of the *court of general sessions* for the city and county of New York is continued beyond the time prescribed by statute (2 R. S. 217, § 31), by reason of the *unfinished trial of a case*, commenced during the regular term—which continuation is provided for by a statute of 1846 (*Laws of 1846*, p. 4)—any prisoners convicted during the term may be *legally sentenced* by the court during its session for such unfinished trial. (*Lounenberg agt. People, court of appeals*, ante 202.)
2. The provision of the revised statutes which required that the warrant for the execution of the *sentence of death*, made out by the court, should *appoint the day on which such sentence should be executed*, was *repealed by the act of April 14, 1860.* (*Id.*)
3. Where the court, in passing sentence of death under the act of 1860, also *fix the day for the execution* of the prisoner, after the expiration of one year from the date of his sentence—making his confinement in the state prison, at hard labor, more than *thirteen and a half months*—although an *error of the court*, is not such an error as *entirely vitiates the sentence*, requiring a reversal of the judgment. (*BALCOM, J., dissenting.*) (*Id.*)
4. It *seems*, that the act of 1860 affirms the common law right to execute persons convicted of murder in the first degree, by hanging, notwithstanding that act declares that such person "shall be punished as herein provided," but makes no provision for the mode of execution. (*Id.*)
5. Where a *juror*, on a trial for murder, was challenged for *principal cause*, on the ground that he had formed or expressed an opinion as to the guilt or innocence of the prisoner, and it was established that he had *formed an opinion* "that the prisoner killed Hoffman" (the deceased), which he had never expressed: *Held*, that this was not an opinion as to the *guilt or innocence* of the prisoner, as the prisoner might have killed Hoffman innocently. (*Id.*)
6. Procuring the intoxication of a sailor with the design of getting him on shipboard without his consent, and taking him on board in that condition, is kidnapping, under our statute (2 R. S., p. 664, § 28); and it is immaterial whether the offender did the acts, or any of them, in person, or caused them to be done. (*Hadden agt. Peopie*, 25 N. Y. R. 373.)
7. Where the intent and expectation is that the seaman will be carried out of this state, the offence is complete although the ship be not, in fact, destined to leave the state. (*Id.*)
8. Parol evidence is admissible of the destination of the ship, though the witness giving it state that he had cleared her at the custom-house, and the clearance was in writing. (*Id.*)
9. The making a counterfeit order for the delivery of property, in the name of a third person, is forgery under our statute (2 R. S. 673, § 33), though the paper be not addressed to any one. (*Noakes agt. People*, 25 N. Y. R. 380.)
10. The distinction between our statute and the English, in this respect, stated *per DAVIES, J.* (*Id.*)
11. The *Meriden Outlery Company* is a sufficient designation of the body, partnership or persons intended to be defrauded. It appearing on the trial that a company did business under that name, and was defrauded, it is immaterial whether it was or was not incorporated, or what was its constitution. It is enough to show an existing body of persons, capable of being defrauded. (*Id.*)
12. A refusal to instruct the jury to disregard the charge that the prisoner intended to defraud persons unknown, for variance from the evidence, is right when there is no evidence on the trial as to what the grand jury knew on the subject. (*Id.*)
13. To support an indictment for bigamy, it is a sufficient marriage in fact that

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the parties agree to be husband and wife, and cohabit and recognize each other as such. It is immaterial whether a person who pretended to solemnize the contract was or was not a clergyman or magistrate, or that either party was deceived by his false representation of that character. (*Hayes agt. People*, 25 N. Y. R. 390.)

14. It is no answer for the accused that, having a wife living and so incapable of a valid marriage, he did not intend or consent to a marriage in fact, but obtained the consent of the woman by fraudulently imposing upon her the form of a marriage by a pretended clergyman. A married man, it seems, imagining himself to effect mere seduction, may blunder into bigamy. (*Id.*)

15. Proof of the manner of intercourse subsequent to the contract is admissible, as a corroboration of the prosecutrix's testimony as to the actual marriage. (*Id.*)

16. An indictment charging, in the same count, an assault to have been committed "with intent to do bodily harm," and also "with intent to kill," being offences against distinct statutes, saved from the objection of duplicity by its not charging the assault "to do bodily harm," to have been "without justifiable or excusable cause." (*Dawson agt. People*, 25 N. Y. R. 399.)

17. This qualification, being in the enacting clause of the statute, must, it seems be negatived to make a good indictment under it; and the charge of an indictment to do bodily harm is surplusage, which does not vitiate a count fully charging an offence under another statute. (*Id.*)

18. After judgment, an allegation in the caption of an indictment that it was found by "a grand jury of good and lawful men" is to be deemed good, though not stating the names nor the number of the jurors. The objection must be taken by motion to quash, or by demurrer. (*Id.*)

19. The statute requiring the filing of an indictment is directory. The omission to file does not, it seems, avoid the indictment. If otherwise, an averment that it was filed with the clerk of the county is equivalent to an averment that it was filed in the court of general sessions. (*Id.*)

20. A recognizance taken in a criminal case, conditioned that the prisoner shall

appear at the next court of oyer and terwimer, to answer to an indictment; that he shall "not depart without leave of the court," and that he shall "abide its order and decision," by its terms requires, substantially, his appearance on the first day of term and *de die in diem* during its continuance, unless discharged by the court. The obligation is not answered by an appearance on the first day of the term, or by appearing and submitting to a partial trial; but that he shall at all times until surrendered, or ordered into custody, submit himself to the jurisdiction or authority of the court, during the whole term of the court, and until the trial is ended. (*People agt. McCoy*, 39 Barb. 73.)

See *TRESPASS*, 9.

DAMAGES.

1. The measure of damages against a purchaser for not performing the contract of purchase, is the difference between the price agreed upon and the actual value at the time of refusal to perform, or of bringing the action. Where, after the purchaser's breach of contract, the land is sold under a foreclosure against the vendor, and there is a deficiency upon the sale, with which he is personally charged, it is error to award to the vendor as his damages, the difference between the contract price and the price of the foreclosure sale, together with the amount charged upon him for the deficiency. The price at the foreclosure sale, is no evidence of its value. (*Wilson agt. Holden*, 16 Abb. 133.)

2. Special damages, or damages not naturally resulting from the injury complained of, cannot be proved unless specially averred. Under a notice given under § 399 of the Code, that the plaintiff will be examined "as to the amount of damages sustained," it is error to admit testimony as to items of special damage, not averred in the complaint. (*Johns agt. Lias*, 16 Abb. 811.)

3. It is not an objection to his recovery of single damages that the complaint goes upon the statute of wilful trespass. (*Dubois agt. Weaver*, 25 N. Y. R. 123.)

4. Where damages are sustained by the makers of a promissory note, in consequence of the breach of an agreement by the payees, to apply the pro-

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seeds of a certain consignment of wheat to the payment of the note, such damages cannot be set-off or made the subject of a counter claim, in an action brought upon a subsequent note, given by the same makers to the payees of the first, and transferred to the plaintiff after maturity—the first note having been collected, and the second being a new and independent security, and resting on a distinct consideration. (*Titus agt. Hinrod*, 39 *Barb.* 581.)

See **SHERIFF**, 9.

See **EVIDENCE**, 13.

See **PARTNERS** and **PARTNERSHIPS**, 11. 12. 13. 14.

See **CONTRACTS**, 19.

See **FALSE IMPRISONMENT**, 4. 5.

DEED.

1. Where a deed is made upon the express condition that the grantee shall keep, maintain and support the grantors, and that if he fails to do so, the conveyance shall be void, and the premises revert back to the grantors; the condition involves a forfeiture of the premises, upon a failure of the grantee to perform, and is intended as a security in the nature of a penalty for its performance. It is a condition subsequent, and upon failure to fulfil, the grantors have a right to re-enter upon the premises. (*Spaulding agt. Hallendeck*, 39 *Barb.* 70.)

See **MARRIED WOMEN**, 20. 21.

DEFENCE.

1. The accommodation indorser of a note given for chattels sold cannot, at law, avail himself of a breach of warranty as to the quality of such chattels, by way of defence, recoupment or counter claim. (*Gillespie agt. Torrance*, 25 *N. Y. R.* 306.)
2. Such a defence does not rest upon a failure of the consideration of the contract on which the action is founded, but is the setting off of one distinct claim against another. (*Id.*)
3. In such case, it is the right of the principal to set up a counter-claim, if sued, or bring his separate action, and the surety cannot make the election for the principal, or do anything to impair his right of recovery in a separate action. (*Id.*)
4. It seems that the surety would be re-

lieved in equity, in case of the insolvency of the principal: *Per Selden, J.* (*Id.*)

5. The indorsee of a note, for a consideration not to be paid till the note should be collected, is the real party in interest to maintain an action thereon. (*Cunningham agt. Morris*, 25 *N. Y. R.* 625.)
6. The note having been transferred, when past due, to one who was to use the avails, in his discretion, for the benefit of the payee's family, the maker cannot set up, by way of defence or counter claim, that the payee was, at the time of the transfer, indebted to him for advances made to a firm of which they and a third person, not a party to the suit, were partners, of which no account had been stated, though the payee die insolvent subsequent to the transfer. (*Id.*)
7. Conceding that there is now no objection to setting off, against a legal demand, a claim arising out of contract which can only be liquidated in equity, the set-off is inadmissible, for the want of a party—the third partner—who would be essential to a suit for the establishment of the claim. (*Id.*)

See **ANSWER**.

See **UNDERTAKING**, 5.

See **MORTGAGE FORECLOSURE**, 11.

DEMURRER.

1. It seems, that where it appears on the face of the complaint that the plaintiff brings suit here as a *foreign administratrix*, and the defendant does not take the *objection by demurrer* to the plaintiff's legal capacity to sue, it is waived, under §§ 144, 1847 and 148 of the Code. (*Robbins agt. Wells*, ante 15.)
2. Where only part of an answer is demurred to, the defendant, under *leave to amend*, can only amend the defective portion of the answer, and cannot set up new defences; but he may add, to the part demurred to, anything which would strengthen the defence as originally made, even if such matter had from any cause been passed over and left unanswered in the first pleading. (*Fielden agt. Carelli*, ante 173.)
3. Redundant and irrelevant matter, and a demand for unsuitable relief, do not render a pleading a subject of demurrer. (*Bishop agt. Edmiston*, 16 *Abb.* 466.)

See **COMPLAINT**, 6.

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DETERMINATION OF CLAIMS TO LAND.

1. An action given under the Revised Statutes respecting the *determination of claims to land* (2 R. S. 313, § 3) is, under the Code, subject to the *same rules*, as all other actions; and the *same defences* to defeat the right to such relief may be set up by the defendant, and also equitable relief by way of *counter claim*. (Peck agt. Brown, ante 350.)

See MARRIED WOMEN, 4. 5. 6. 7. 8.

DISCOVERY OF BOOKS AND PAPERS.

1. The court has power to compel a *discovery of books and papers* containing evidence relating to the merits of the action, under the provisions of the Revised Statutes, as well *after issue joined as before*. (Morrison agt. Sturgis, ante 177.)
2. The 388th section of the Code is not a substitute for the provisions of the Revised Statutes, but *auxiliary thereto*. Under either statute the court must be satisfied that the books or papers contain *evidence relating to the merits of the action*. (Id.)
3. It is not enough that the party believes or is advised that the paper contains material evidence. *Facts must be shown* to support such belief. Nor is it enough that the paper may, or even probably will, furnish *information to obtain evidence* which may be material. The *paper itself* must contain evidence, either by itself or in connection with other proof. (Id.)

DISTRICT COURTS.

1. Under the act of 1863, amending the Revised Statutes relating to "summary proceedings to recover the possession of land," the *affidavit* upon which the process is issued by the *district courts* in the city of New York, must be *sworn or affirmed to before the clerk or his deputy*. If not sworn to, all subsequent proceedings, with the affidavit, are *void*. (People ex rel. Cole agt. Alden, ante 166.)

See JUDGMENT, 8.

DIVORCE.

1. In an action for a *divorce* for alleged *adulteries* of the defendant, during a

certain period, the plaintiff is not required to proceed by *supplemental complaint*, but may commence a *second action* demanding the same relief for alleged adulteries with the same person, charged to have occurred *after the commencement of the first action*; and an answer of the defendant to the second action, of another action pending in the court for the same cause, is *insufficient*. (SUTHERLAND J., dissenting.) (Cordier agt. Cordier, ante 187.)

2. Where the *order* of the court requires the defendant to *stipulate to refer the action*, as a consideration for leave to answer, it is *erroneous*. The defendant has a right to have any defense on the merits to such an action tried in the usual manner. (Id.)

See ALIMONY, 1. 2. 3.

See NEW TRIAL, 14. 15. 16.

DOWER.

1. An *alien widow* cannot be endowed of lands of her husband, who was a naturalized citizen of the United States at the time of his death, where the marriage took place prior to the act of the legislature of this state passed April 30, 1845, when both husband and wife were *aliens*, and the widow never having been a resident of this country. (Greer agt. Sanketon, ante 474.)
2. "Any woman being an *alien* who has heretofore married or who may hereafter marry a citizen of the United States, shall be entitled to dower in the real estate of her husband, within this state, as if she were a citizen of the United States." (Laws 1845, ch. 118, § 3.) (Burton agt. Burton, ante 471.)
3. "Any woman who might lawfully be naturalized under the existing laws, married or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen of the United States." (Act of Congress, Feb. 10, 1855, 10 Stat. at Large, p. 604, § 2.) (Id.)
4. Where the plaintiff, an *alien widow*, having married an alien prior to the passage of the act of the legislature in 1845, and never having resided in this country prior to her husband's death, *held*, that she had no *dower right* in the lands of which her husband died seized as a citizen of the United States. (Id.)
5. Held, also, that the act of Congress of 1855, was designed for the benefit of an

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alien white woman, whether resident or not, married to a person who was at the time of the marriage a citizen of the United States. But if construed with liberality, it would only extend to an alien woman resident in this country, though married abroad to an alien, and who came to this country with him or followed him here, and in that way, or in one of these ways identified herself with the country of his adoption. (*Id.*)

6. The statute requiring notice of proceedings for the admeasurement of dower to be given to the owners of the land claiming a freehold estate therein, is not complied with by merely giving notice to the tenant or person in possession. With the consent of a dowress, rooms in a building can be assigned for dowry, but, it seems, not without her consent. (*Stewart agt. Smith*, 39 *Barb.* 167.)

EVIDENCE.

1. Although the technical rule is, that under a complaint setting out a contract, and averring its performance by the plaintiff, evidence in excuse for non-performance is not admissible, yet, under the Code, the plaintiff may amend his complaint, and then give the evidence. (*Hosley agt. Black, court of appeals*, ante 97.)

2. The rule is, if an offer of evidence contains any matter not admissible as evidence, the whole may be rejected. (*Id.*)

3. Where the contract declared on is in writing, no condition can be engrafted upon it by *parol* evidence. (*Id.*)

4. *Hearsay* evidence is admissible to show the death of a person after a considerable lapse of time; but it is not receivable when the alleged death was of recent occurrence, and when it may fairly be supposed that other and more satisfactory evidence could be obtained. (*Stowenel agt. Stephens*, ante 244.)

5. *Hearsay* evidence is *intrinsically weak*, incompetent to satisfy the mind of the existence of a fact, and by its admissibility frauds may be practised under it. (*Id.*)

6. Where a party introduces in evidence an affidavit of his adversary, in which it is stated that a previous affidavit made by the former is false, it does not authorize the admission of such

previous affidavit. (*Degraf agt. Hoyey*, 16 *Abb.* 120.)

7. A judgment is not evidence of any of the facts determined by it, except as against parties and privies. Where the defendant, to show the truth of his representation that he was a partner of H., offered the judgment roll in an action brought by his assignee against H., tending to show the existence of such partnership, it was decided to be inadmissible against a stranger to that action. (*Id.*)

8. In an action to recover damages for the breach of a contract to purchase real estate, where a defence of defect in title is interposed, the burden of proof is upon the plaintiff, to show affirmatively that he had a good title. Although a conveyance with possession under it, is, in the first instance, presumptive evidence of title to real property, it is not enough where direct issue is taken on the title. (*Wilson agt. Holden*, 16 *Abb.* 133.)

9. In an action upon a promissory note, where the plaintiff's title to the note is disputed, he is entitled to have the jury instructed that the holder of a negotiable promissory note, who produced it upon the time, is presumed to be a *bona fide* holder, and that the burden of proof is on the defendant to show the contrary. Where the presumption of law is in favor of one party, it is error to refuse to so instruct the jury, although the adverse party has already introduced evidence sufficient to sustain a verdict overthrowing such presumption. (*Potter agt. Chadsay*, 16 *Abb.* 146.)

10. Conclusive evidence means either a presumption of law, or evidence so strong as to overbear in the case to the contrary. In an action for malicious prosecution in arresting the plaintiff for a felony, the fact that the plaintiff was, on the hearing, committed by the magistrate to await the action of the grand jury, is not conclusive evidence of probable cause. Although in such action, want of probable cause is a question of law, yet the question may properly be passed upon by the jury, in the absence of any request to the judge to instruct them as to the law. (*Haupt agt. Pohlmann*, 16 *Abb.* 301.)

11. A refusal to non-suit, will be sustained on appeal, if it appears that there was finally in the case sufficient evidence to be submitted to the jury. (*Id.*)

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12. It is competent to show by parol the grounds on which a verdict or judgment was rendered, when the grounds become material and do not appear on the record. (*White agt. Madison, court of appeals, ante 481.*)

13. Evidence offered in a case of *breach of warranty*, which has a legitimate tendency to satisfy the jury that the warranty was not broken, or which may be material upon the question of damages, if there was a breach of the warranty *in part only*, is properly admissible, and its exclusion is sufficient ground to reverse the judgment. (*Lytle agt. Erwin, ante 491.*)

14. The plaintiff, to show that his property had been applied to the defendant's use, in payment of a note made by the defendant and indorsed by the plaintiff, proved that the defendant pointed out the property to the sheriff and declared that it was the plaintiff's: held, that the defendant was entitled to prove his statement in the same conversation that the note was the plaintiff's debt and he was to pay it. (*Rause agt. Whited, 25 N. Y. R. 170.*)

15. The rule of evidence, in respect to parts of the same conversation, laid down in *The Queen's case* (2 Brod. & Bing. 297), disapproved, and that in *Prince v. Samo* (7 Ad. & El. 627), approved: *Per SUTHERLAND, J. (Id.)*

16. In an action for deceit in the sale of land, evidence of statements by the defendant, after the deed was put into the plaintiff's hands and before the parties had separated, is admissible either as bearing upon the question of good or bad faith in similar representations made before the deed was drawn or upon the question whether the delivery of the deed was complete. (*Thomas agt. Beebe, 25 N. Y. R. 244.*)

17. Parol evidence, it seems, is admissible, in addition to the written contract of sale or mortgage, that, by the agreement of the parties, the brewer was not to sell the barley delivered under the contract, or malt made from it, without the plaintiff's permission. (*Wooster agt. Sherwood, 25 N. Y. R. 278.*)

18. Evidence is inadmissible, in support of the assignment, that the parties did not agree *al iude* that the assignor should retain possession. (*Forbes agt. Waller, 25 N. Y. R. 430.*)

19. The party seeking to impeach the assignment is entitled to inquire of the assignor as to his object and intent in making it. (*Id.*)

20. In an action for the firing of a building by a steam engine, the plaintiff is entitled to give evidence of the distance at which sparks emitted by the engine had kindled fires. (*Hinds agt. Barton, 25 N. Y. R. 544.*)

21. A notice that the defendant would be a witness in his own behalf "as to all the alleged facts in the plaintiff's complaint," does not specify the points as to which he was to be examined, as required by the Code in force in 1857. (*Id.*)

22. The liability of the owner of the engine turns upon actual negligence in its use, and not upon its being constructed in the form generally adopted, and used in the ordinary manner, with the usual precautions. (*Id.*)

23. Medical testimony, as to the personal injuries likely to be produced, under a given state of facts, is admissible, where the witness states the precise facts on which he bases his opinion, and the court does not withdraw from the jury the right or liberty to consider whether those facts were established by the testimony. (*Wendell agt. Mayor, &c., of Troy, 89 Barb. 829.*)

24. Before evidence of the acts and declarations of persons not parties to an action can be properly received in evidence, on the ground of there having been a common intent or purpose to hinder, delay or defraud creditors, the common unlawful design should be clearly proved as a condition precedent. Evidence which is merely admissible on the question of the common illegal purpose, is not sufficient. It is the province of the judge, and not of the jury, to pass upon the question whether there was a common intent or purpose to defraud among the parties whose declarations are sought to be proved. (*Jones agt. Hurlbut, 39 Barb. 403.*)

See CONVERSION, 1.

See NEW TRIAL, 5. 6.

See SHERIFF, 6. 7.

See PARTNERS AND PARTNERSHIPS, 6. 7. 11. 12. 13. 14.

See USURY, 1.

See BANKING CORPORATIONS, 3. 4.

See CONTRACTS, 19.

See FALSE IMPRISONMENT, 4. 5.

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See **NON-SUIT**, 1. 2. 3.

See **CRIMINAL LAW**.

See **CAUSE OF ACTION**, 7.

EXCEPTIONS.

See **PARTNERS AND PARTNERSHIPS**, 5.

See **COSTS**, 10.

See **NEW TRIAL**, 7. 8. 9. 10. 11. 12. 18.

EXECUTION.

1. *It seems* that an action in the nature of a creditor's bill is maintainable upon the return of an execution before the expiration of sixty days from its delivery to the sheriff. (*Forbes* agt. *Waller*, 25 N. Y. R. 430.)

2. It is immaterial that such return was made at the request of the plaintiff. To constitute a defence, the plaintiff must, by collusion with the sheriff, have procured a return of *nulla bona*, without an attempt in good faith to find goods subject to levy. (*Id.*)

3. Whether such a defence is available to one claiming as assignee of all the debtor's goods, before the issuing of the execution, *quare*. (*Id.*)

See **RECEIVER**, 1. 2. 8.

See **SHERIFF**, 9.

EXECUTORS & ADMINISTRATORS.

1. The liability of an executor to account to a legatee, is not discharged by her written receipt of a nominal sum in full of all demands, nor by her conveyance to him of all her estate upon a passive trust under an ante-nuptial settlement. (*Harris* agt. *Ely*, 25 N. Y. R. 138.)

2. The surrogate has jurisdiction to compel such accounting, to enable the legatee to ascertain what is in the hands of the trustee: until an accounting, voluntary or judicial, he holds the assets of the testator as executor, and not as trustee. (*Id.*)

3. *It seems*, that, in case anything be found due the legatee, the decree should be that the executor hold the amount as trustee, unless the legatee entitle herself to receive it, by a certificate under the act (ch. 375 of 1849, (§ 2), to protect the rights of married women. (*Id.*)

4. An action will not lie by two executors against the other executrix and her husband, to recover damages against the husband for the alleged wrongful conversion by him of certain chattels and choses in action of the testator, in his lifetime. The plaintiffs have no right of action except as executors, and the several executors are regarded in law as but one person representing the testator, and having a joint and entire interest in the testator's effects, which is incapable of being divided. Nor is the question materially varied by the circumstance that the executrix defendant is a legatee as well as executrix. A legatee, as such, has no right of action in such a case. (*Whitney* agt. *Coopman*, 39 *Barb.* 482.)

See **MORTGAGE**, 7.

EXPRESS COMPANIES.

1. Where an *express company* show by *prima facie* evidence that they either delivered a box of goods to the authorized agent of the person to whom it was addressed, or that the *seller* of the goods from whom the company received the box had *sanctioned the delivery* to such alleged agent; in either case the company are discharged from liability to the seller for the non-delivery of the goods to the person to whom the box was addressed. (*Platt* agt. *Wells, ants* 442.)

FALSE AND FRAUDULENT REPRESENTATIONS.

1. The allegation in a complaint that the defendant "falsely and fraudulently represented," is a sufficient statement of the *scienter*. (*Thomas* agt. *Beebe*, 25 N. Y. R. 244.)
2. In an action for deceit in the sale of land, evidence of statements by the defendant after the deed was put into plaintiff's hands and before the parties had separated, is admissible either as bearing upon the question of good or bad faith, in similar representations made before the deed was drawn or upon the question whether the delivery of the deed was complete. (*Id.*)
3. When the fraudulent representations relate to the quantity of the land, it is immaterial whether the sale is in gross or by the acre. (*Id.*)
4. Where a debtor, with intent to hinder and delay his creditors, falsely and

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fraudulently holds out to the public and pretends that personal property bought and paid for by him, and in his possession, belongs to A. the lease of the store and the sign upon it being in the name of A. the debtor is estopped from claiming the property as his, when levied upon by a creditor of A. (Riggey agt. Smith, 39 Barb. 383.)

See PARTNERS and PARTNERSHIPS,
3. 4. 11. 12. 13. 14.

FALSE IMPRISONMENT.

1. Where a *complaint* is susceptible of no other interpretation than a charge of *illegal arrest, detention and restraint of liberty*, the action is one of *false imprisonment* and not of malicious prosecution. (Burns agt. Erben, *ante* 273.)
2. The metropolitan police act allows the officers of police to *arrest* persons *suspected by them, without warrant*, where there is reason to believe a *felony* has been committed. (*Id.*)
3. Where the plaintiff in an action for false imprisonment has, upon the evidence, recovered nominal damages against a police officer for arresting her on a charge of felony, the court on appeal will not interfere with the judgment. (*Id.*)
4. Under the Code, in an action for false imprisonment, a justification on the ground that the defendant had reason to suspect that a criminal offence had been committed by the plaintiff, must be pleaded specially; and the answer must first show the actual commission of an offence, and then the cause to suspect the plaintiff of its commission. Where no justification is pleaded, evidence showing grounds for suspecting the plaintiff of the commission of a crime, is admissible upon the question of damages only. (Brown agt. Chadsay, 39 Barb. 253.)
5. In an action for false imprisonment the jury has a right to give damages beyond a mere compensation to the plaintiff for his injuries, and inflict a punishment upon the defendant, but not to an arbitrary amount. Under what state of facts and circumstances a new trial will be granted on the ground that the damages are excessive. (*Id.*)

FOREIGN CORPORATIONS.

1. No power can be exercised by the supreme court, over a foreign corporation

in proceedings commenced by a stockholder, to wind up its affairs. But for the purpose of preserving its property for the benefit of creditors or stockholders, a court of equity has ample power to take charge of it, and to appoint a receiver. (Murray agt. Vanderbilt, 39 Barb. 140.)

See BONDS, 5. 6. 7.

FOREIGN EXECUTORS AND ADMINISTRATORS.

See COMPLAINT, 1.

See GUARDIAN, 1. 2.

FREIGHT.

1. A *master of a vessel*, although not the owner, may maintain an action in his own name to recover for the freight earned by her. (Kennedy agt. Eilaw, *ante* 187.)
2. Where an *express company* show by *prima facie* evidence that they either delivered a box of goods to the authorized agent of the person to whom it was addressed, or that the seller of the goods from whom the company received the box had *sanctioned the delivery* to such alleged agent; in either case the company are discharged from liability to the seller for the non-delivery of the goods to the person to whom the box was addressed. (Platt agt. Wells, *ante* 442.)

See COMMON CARRIERS.

GUARANTY.

1. Where on a purchase of goods a third person guarantees the payment to a certain amount, *based upon a credit of six months from the dates of the respective purchases*, and where the dates of the several purchases are *averaged*, and *notes* of the purchaser are taken *dated on the average date*, whereby the term of credit is extended as to some items and diminished as to others, the guarantor is *discharged*. (Stewart agt. Ranney, *ante* 279.)
2. Though such method of averaging the account and taking notes may be an *established custom of trade*, such custom cannot render the guarantor liable, because the custom is in direct opposition to the terms of the guaranty. (*Id.*)
3. The effect of *customs of trade* on

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commercial transactions stated and discussed. (*This decision reverses S. C. at special term*, 23 How. Pr. R. 205.) (*Id.*)

4. Where a promissory note is guaranteed by a separate instrument, title to the guaranty will pass by delivery of the note, for a good consideration. The transfer of the note guaranteed, and the delivery with it of the guaranty, carries with it the title to the guaranty without any written assignment. (*Gould agt. Ellery*, 39 Barb. 163.)

GUARDIAN.

1. A *guardian or committee of a lunatic* appointed under and in pursuance of the laws of *another state*, where the lunatic and guardian reside, cannot be *recognized by our courts*, on an application by the guardian for property belonging to the lunatic in this state. (*Matter of Neally*, ante 402.)

2. *Foreign executors and administrators* may apply here for, and receive, *letters testamentary and of administration*; but our laws have never extended such a privilege to a foreign guardian or committee of a lunatic. Such an appointment can only be made under proceedings instituted in this state to ascertain the fact of lunacy. (*Id.*)

3. Although the rule is that no other recompense can be allowed a guardian, for duties strictly official, than such as the statute provides for conducting the administration of the estate, in all that legitimately pertains to it, yet it is not so narrow and restricted that it denies all compensation to him for services of a personal or professional nature rendered by him for the benefit of the ward, and in doing which he has bestowed personal labor, and incurred actual expenses, and which have been useful and serviceable to the estate. (*Morgan agt. Morgan*, 39 Barb. 20.)

4. The legislature by the act of April 10, 1862, amending the act of March 20, 1860, and repealing a provision in the latter act, constituting every married woman the joint guardian of her children, with her husband, did not intend to restore the power given to the father, by the Revised Statutes, of appointing a testamentary guardian, or to infringe materially upon the mother's right to the custody of her children, in case she survived her husband. (*People agt. Boice*, 39 Barb. 307.)

5. A *guardian ad litem*, of his own mere motion, and without the order of the court, cannot make an absolute settlement of the whole matter in controversy, so as to bind the infant. (*Edsall agt. Vandemark*, 39 Barb. 589.)

See PARTITION, 1. 2. 3. 4.

HIGHWAYS AND STREETS.

1. Proceedings by *referees to lay out a highway* are null and void, where they do not give the *notice* required by statute to the occupants of the land through which it is to run. (*People ex rel. Gould agt. Croster*, ante 195.)

2. And where it appears from the moving papers that the occupants of the land *waived such notice*, the *waiver may be retracted in the opposing papers*, where the consent has not been acted upon. (*Id.*)

3. The *referees may commence anew regular proceedings* in such case, notwithstanding their void proceedings. (*Id.*)

4. Where the *commissioners of highways of two adjoining towns, in different counties*, assemble together in *joint board*, and unite in an order laying out or refusing to lay out, altering or discontinuing, or refusing to alter or discontinue, a road or highway, their judgment and determination cannot be *reviewed by appeal to a county judge of one of the counties*. (*People ex rel. Clarkson agt. County Judge, &c.*, ante 346.)

5. *It seems*, that in the absence of any provision of the statute for review in such a case, the determination of the joint board of commissioners must be considered final, and equivalent in all respects to an order of one board of commissioners affirmed by three referees on appeal. (*Id.*)

6. An assessment of damages caused by laying out a highway, by commissioners appointed by the county court (2 R. S. 5th ed. 397, § 83), is not annulled or invalidated by applying for a jury under § 85, to re-assess such damages; nor is the original assessment affected, where the proceedings to reassess the damages, are discontinued, or the jury fail to agree. The award of the commissioners is in effect a judgment in favor of the owners of the land against the town, and is final and conclusive until reversed on *certiorari* or vacated by a re-assessment actually

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made. (*People ex rel. Lumley* agt. *Lewis*, ante 381.)

7. When the jury fail to agree on a re-assessment of such damages, a new jury may be summoned and impanelled, before whom the same proceedings shall be had for such re-assessment, as might have been had before the first jury. (*Id.*)
8. Where no proceedings were taken for eleven months to call out a new jury after the first failed to agree, held that the party applying for such re-assessment had abandoned the same. (*Id.*)
9. The provisions of the statute in relation to plank roads and turnpike roads declaring that "farmers living on their farms within one mile of any gate," &c., "shall be permitted to pass the same free of toll, when going to or from work on said farms," does not apply to the travel to and from a parcel of land owned by such farmer, which is entirely separate from, and not contiguous to the homestead. (*Cummings* agt. *Waring*, 39 Barb. 630.)

See **RAILROADS**, 14. 16.

See **ASSESSMENT**, 1.

See **MUNICIPAL CORPORATIONS**, 6.

HOMESTEAD EXEMPTION.

1. The homestead exemption act, passed April 10, 1850, does not contemplate the exemption of a homestead from sale on execution issued upon a judgment for a cause of action sounding in *tort*; nor on an execution issued in such action on a judgment for the defendant for costs. (*Lathrop* agt. *Singer*, 39 Barb. 396.)

HUSBAND AND WIFE.

1. A wife mortgaged her land as a continuing security for notes to be indorsed by her husband, or any renewals thereof: *Held*, that an agreement by the creditor to extend the time of payment for the debt due upon such notes, without a renewal thereof, discharged her liability as surety. (*Smith* agt. *Townsend*, 25 N. Y. R. 479.)

See **MARRIED WOMEN**, 4. 5. 6. 7. 8. 16. 17. 20. 21.

See **CRIMINAL LAW**, 13. 14. 15.

IMPRISONED DEBTOR.

1. A person charged in execution in a civil cause, and held in custody by vir-

tue thereof, is entitled to apply for a discharge from his imprisonment under 2d Revised Statutes, 31, article 6, as well where he is on the limits as in close custody. (*Bylandt* agt. *Comstock* [25 How. Pr. R. 429], so far as it decides to the contrary, disapproved.) (*Coman* agt. *Storm*, ante 84.)

2. The release by consent of the plaintiff, of an imprisoned debtor upon execution against his person, does not operate as a satisfaction of the judgment. (*Pettigill* agt. *Mather*, 16 Abb. 399.)

INFANT.

See **PARTITION**, 1. 2. 3. 4.

See **STATUTE OF LIMITATIONS**, 2.

See **GUARDIAN**, 5.

INJUNCTION.

1. A *scientific invention*, claimed to be an improvement in the manufacture of malt liquors, is the subject of protection by injunction by the state courts, whether or not the invention is of such a nature that it could be *patented*. (*Hammer* agt. *Barnes*, ante 174.)
2. Where the plaintiff shows that he will be entitled to final relief by injunction or otherwise against any person, although such person is not a party to the contract alleged to be violated, he is properly made a *party defendant*. (*Id.*)
3. Persons having *no interest* in the controversy, although they are general partners of the plaintiff, cannot properly be made *parties plaintiff*. (*Id.*)
4. Persons who have acquired from the defendants a knowledge of a secret invention for which the plaintiff claims protection, are not necessary parties. (*Id.*)
5. It is not indispensable to the validity of an injunction order, that a formal complaint in the action should precede or accompany the injunction. To authorize the issuing of an injunction, in an action commenced by summons alone, it is sufficient if it appear by affidavit that the complaint, when drawn, will state facts sufficient to warrant the order. (*Maltice* agt. *Gifford*, 16 Abb. 246.)
6. An injunction from this court will not be granted to restrain an action pending in the United States court. (*Mariposa Company* agt. *Garrison*, ante 448.)

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7. An injunction will not ordinarily be granted to prevent acts, the commission of which is not alleged to be apprehended. (*Id.*)

8. An injunction is not necessary to prevent property being conveyed by the defendant to a *bona fide* purchaser, where all the rights of the plaintiff must be determined by the construction to be given to written instruments which are recorded; as any purchaser would take with notice of them, and be bound by them the same as the defendant is. (*Id.*)

9. Although this court by having jurisdiction over the person of the defendant, may compel specific performance of a contract in relation to lands situated in another state, still the granting of a preliminary injunction is matter of discretion. And where the plaintiff has adequate remedies for the preservation and enforcement of all his rights in the courts of another state, involving rights to land in that state, or in the United States courts; it is not sound discretion to aid by injunction in drawing within the jurisdiction of this court, the decision of those questions which can more appropriately be investigated and determined elsewhere. (*Id.*)

10. The want of jurisdiction of the court over the subject matter of the action, will not deprive the defendant served, or the defendants, who have not been served, but who have obeyed the injunction, of the right to damages upon the injunction undertaking, when the injunction is dissolved by a dismissal of the complaint. (*Cumberland Coal and Iron Co.* agt. *Hoffman Steam Coal Co.*, 39 Barb. 16.)

See JUDGMENT, 20. 21.

INSOLVENT DEBTOR.

1. Where an *insolvent debtor*, previous to his imprisonment on a *ca. sa.* in the county jail, had been convicted of *forgery*, and under his sentence had served out his term of imprisonment in the state prison, never having been pardoned: *Held*, that he was thereby *disqualified* from making an *affidavit to his petition* for his discharge from imprisonment under the insolvent laws. (*People ex rel. Lord* agt. *Robertson*, ante 90.)

2. Where one purchases a demand against an insolvent debtor, knowing him to be

such, for less than the nominal amount of the demand, he cannot by prosecuting it to judgment, and recovering the whole amount, entitle himself to be considered a creditor for the whole amount, under the statute (2 R. S. 36 § 10) by which it is provided that an assignee, executor, &c., petitioning as creditors in any of the cases in which non-resident, absconding, insolvent or imprisoned debtors are authorized to make assignments, are to be deemed creditors only to the actual amount paid for the debt or demand; and prosecuting the debt to judgment does not alter the case. (*Emerson's Case*, 16 Abb. 457.)

3. The fact that the petitioners for the discharge of an insolvent are not creditors for two thirds of the aggregate of the insolvent's debts, is sufficient to prevent a discharge being granted, though not ground for avoiding it, after it has been granted. (*Id.*)

4. The statute (2 R. S. 35 § 2) requiring proof that an insolvent whose discharge is petitioned for resides, or is imprisoned in the county in which resides the officer to whom the petition is presented, such proof is an essential preliminary to the jurisdiction of the officer. It will not be assumed in favor of an insolvent's discharge that proper proof as to the insolvent's residence, which is not suggested by the record, was in fact given. (*People agt. Machado*, 16 Abb. 460.)

INSURANCE COMPANIES.

1. Where a *promissory note* given to and payable to the order of an *insurance company*, is transferred before maturity to the *president* (by indorsement of the *secretary*), without any previous authority of the *board of directors*, as required by the statute relative to moneyed corporations (1 R. S. 598, § 51, L. 1844, 229, and L. 1855, 505), the president obtains no title to the note, and is subject to the penalties prescribed by the statute for such unlawful taking. (*Houghton agt. McAuliffe*, court of appeals, ante 270.)

2. Such a note being the property of the company, and having been transferred or assigned unlawfully, it is *prima facie void* in the hands of an *assignee or holder*; and he must show that he purchased it for a valuable consideration and without notice of the facts which the statute declares render the transfer void and illegal, in order to sustain his action upon it. (*Id.*)

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3. Insurance companies, without any special authority for that purpose, possess the incidental power to borrow money, and this power includes that to obtain indorsers or sureties, and secure them by a transfer of assets; and it is immaterial whether such transfer is directly to the indorsers, or to trustees for their benefit. (*Nelson agt. Eaton, court of appeals*, 16 Abb. 113.)
4. A *sheriff* by a seizure of goods on attachment, acquires such a special property as gives him an insurable interest in the goods. (*White agt. Madison, ante* 481.)
5. And where the sheriff has authority to insure such goods, his *deputy* who seized them, might insure them in the name of the sheriff; but this power does not authorize the deputy to give a premium note in the name of the sheriff, and thus subject the sheriff to the hazards of that most unsafe of partnerships, a *mutual insurance company*. (*Id.*)
6. A promissory note given to a mutual insurance company, organized under the general law of 1849, for shares of its capital stock, payable in portions from time to time, &c., is in legal effect, payable on demand; that is, at its date; and the statute of limitations begins to run against such a note at the time it is given. (*Colgate agt. Buckingham, 39 Barb.* 177.)

7. Where a purchaser of premises agrees to insure the buildings for the benefit of his grantor, and to assign the policy for his security, and on insuring the building, he neglects to assign the policy, the agreement, nevertheless, operates as an equitable assignment of the money payable on the policy in case of loss, but not as an assignment of the policy. (*Cromwell agt. Brooklyn Fire Insurance Co.*, 39 Barb. 227.)

INTERPLEADER.

1. A person who is sued for detaining property which he has volunteered to take under his control for the protection of the right of a supposed owner, cannot maintain an action to require the person from whom he took the property, and such supposed owner, to interplead respecting it. By his own wrong he interfered against one claimant for the benefit of another, and is not entitled to an interpleading to determine between the claimants. (*United States agt. Victor*, 16 Abb. 153.)

IRRELEVANT MATTER.

1. The power to strike out a defence, on motion, should never be exercised in a case in the slightest degree doubtful, nor unless the court can, upon a mere statement of the case and without argument, declare the defence to be irrelevant, or frivolous. (*Webb agt. Van Zant*, 16 Abb. 190.)

See DEMURRER, 3.

JAIL LIMITS.

1. A person charged in execution in a civil cause, and held in custody by virtue thereof, is entitled to apply for a discharge from his imprisonment under 2d Revised Statutes, 31, article 6, as well where he is on the limits as in close custody. (*Bylands agt. Comstock* [25 How. Pr. R. 429], so far as it decides to the contrary, disapproved.) (*Coman agt. Storm, ante* 84.)
2. Any change which the legislature may make in the limits of the town or city cannot be regarded as affecting the limits or liberties of the jail, without some additional words indicating such a purpose. (*Chamberlain agt. Campbell*, 39 Barb. 642.)

JOINT DEBTORS.

1. Where judgment has been recovered, in one action, against two or more parties, they are, in respect to such judgment, joint debtors. (*Barnes agt. Smith*, 16 Abb. 420.)
2. Under § 167 of the Code, a cause of action on contract against A. cannot be joined with a similar cause of action against A. and B. jointly. (*Id.*)

See PARTNERS and PARTNERSHIPS.

JOINT STOCK COMPANIES.

1. The members of a joint stock company cannot be sued as such, until after a suit has been brought against the association in the manner prescribed by the statute (3 R. S. 5th ed. 777, §§ 122, 125), and judgment obtained against it, and execution thereon has been issued and returned unsatisfied. That is, the remedy at law must be first fully exhausted against the association, before an action will lie against the individual members. (*Robbins agt. Wells, ante* 16.)

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2. A joint stock company is not such a corporation as to entitle its officer to refuse to produce its papers in his custody, when required by a subpoena. (*Woods* agt. *De Figaniere*, 16 Abb. 169.)

3. In pleading the liability of a stockholder under the law of 1848, ch. 40, § 10, which provides that stockholders, in manufacturing corporations, shall be liable, in case the capital is not paid in, for debts of the company, in an amount equal to the amount of stock held—it must be averred that such stockholder held an amount of stock equal to the amount for which he is sought to be held liable. And in pleading the liability of a trustee under § 12, it must be averred that the debt was existing at the time of the failure to publish the annual certificate, or that it was contracted afterwards, before such report was published. Also, in pleading the liability of a trustee who has consented to an increase of the company's indebtedness beyond its capital, in violation of § 23, it must be averred that the excess of debt over the capital was equal to, or exceeded, the amount for which he is sought to be held liable. (*Chambers* agt. *Lewis, court of appeals*, 16 Abb. 433.)

4. The act (ch. 361 of 1852) to secure the payment without preference of the debts of certain manufacturing corporations, incorporated under the general law of 1811, does not impair the obligation of contracts, and is valid. (*Story* agt. *Furman*, 25 N. Y. R. 214.)

5. The remedy to enforce the liability of stockholders, under the act of 1811, is not so affected as to impair the obligation of the contract by the provision of the act of 1852, for the transfer to trustees of the right of action in behalf of all the creditors, nor because such trustees are directed to resort to the assets of the corporation as the primary fund, instead of the personal responsibility of the stockholders. (*Id.*)

6. The validity of certain proceedings to execute this act determined upon the construction of a finding of facts, discussed, per *SMITH*, J. (*Id.*)

See *CONSTITUTIONAL LAW*, 3. 4.

See *TRUSTEES*, 1.

See *EXPRESS COMPANIES*, 1.

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JUDGMENT.

1. Where the plaintiff's attorney returned the answer of the defendant to his attorney, on the ground that the defendant told the plaintiff's attorney that he never swore to it, and entered judgment against the defendant as for want of an answer: *Held*, that the judgment be set aside for irregularity, with \$10 costs. (*Chadwick* agt. *Snediker*, ante 80.)

2. An assignment of a judgment, upon a condition of being reassigned in case it cannot be set off, does not transfer the ownership of it with sufficient absoluteness to enable the assignee to set it off by analogy. (*Butler* agt. *Niles*, ante 61.)

3. And an assignment of a judgment, upon condition of a rescission of the transfer, in case the assignee cannot avoid a set-off, cannot be a transfer absolute enough to evade it. (*Id.*)

4. In an action to set off judgments by the plaintiff as assignee of the judgment, he cannot, even if entitled to set off his judgment against that of the defendant, make use of it to defeat the incidental claims for costs growing out of any legal proceedings to collect the defendant's judgment, instituted before the assignment of the plaintiff's judgment to him. (*Id.*)

5. All judgments filed and docketed by a clerk out of office hours, although some may be entered before others, must take effect and become liens equally at the next office hour after such docketing. (*France* agt. *Hamilton*, ante 180.)

6. This rule does not apply to executions delivered to sheriffs; for business with sheriffs may be transacted at other places besides their offices, and outside of office hours. (*Id.*)

7. A judgment against several defendants for separate sums, but providing that in case of the insolvency of any of such defendants the others shall be liable in fixed proportions, but not to exceed a certain sum final, is properly to be docketed as a judgment for the amount of the ultimate contingent liability. (*Rankin* agt. *Sacchi*, 16 Abb. 368.)

8. A judgment recovered in a district court in the city of New York, and docketed so as to become a judgment of the common pleas, an execution against the person issued upon it, will not be set aside on the ground that the action was commenced by summons in-

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stead of warrant; nor on the ground of irregularities in the service or method of obtaining the judgment. The remedy is by appeal. (Whiting agt. Putnam, 16 Abb. 382.)

9. The release by consent of the plaintiff of an imprisoned judgment debtor upon execution against his person, does not operate as a satisfaction of the judgment. A judgment debtor demanding a satisfaction piece of the judgment, is bound to offer the instrument to be executed to the creditor, and to offer to pay the expenses of its execution. (Pettingill agt. Mather, 16 Abb. 399.)

10. When the plaintiff unites in the same action, a claim which is *not disputed* with one that is, the defendant, under section 385 of the Code, may remove from the controversy the undisputed claim, by the *offer* provided for under this section, and thus make the *subsequent costs* depend upon the result of the litigation in regard to the *disputed claim*. But the offer must be fully equal to the sum actually and really due to the plaintiff, or he is not bound to accept it. (Budd agt. Jackson, ante 398.)

11. The "more favorable judgment" mentioned in section 385, which the plaintiff must recover to entitle him to costs, does not mean, in the case of a money demand upon which interest is accruing, a sum greater at the time of the report or verdict than the sum offered. If the verdict or report is made up of principal and the interest which accrued thereon, in determining which is most favorable to the plaintiff, the *interest which accrued intermediate the time of the offer and the time of the rendition of the judgment*, is to be rejected therefrom. (Id.)

12. Thus, in this case, the sum named in the written offer was \$357.44, and the sum found due to the plaintiff by the referee was \$377.17, being \$19.73 in excess of the sum expressed in the offer, but as this excess was not equal to the *interest from the time of the offer to the date of the report*, the plaintiff failed to obtain a more favorable judgment. (Id.)

13. It is competent to show by parol the grounds on which a verdict or judgment was rendered, when the grounds become material and do not appear on the record. (White agt. Madison, court of appeals, ante 481.)

14. As a condition precedent to a right of recovery by a party to a *judgment*, *leave to prosecute* the judgment must be obtained from the *court in which the judgment was rendered*. And without an *allegation* that such permission has been obtained, the complaint fails to show a *cause of action*. (Graham agt. Scripture, ante 501.)

15. It seems that the 71st section of the Code imports that *leave to prosecute*, should be obtained from the *court in which the judgment was rendered*. And perhaps a fair construction of the language of this section would, in some cases, extend its application, so as to permit a motion for *leave to prosecute*, to be made to the *court which has control of the judgment and execution*. (Id.)

16. An order for *leave to prosecute* a judgment obtained in the *late court of common pleas*, may be obtained from the *county court*. (Id.)

17. Upon an application to the court, by motion, to cancel a judgment entered upon confession without action as having been paid, the court may order a reference to ascertain the facts. (Dwight agt. St. John, 25 N. Y. R. 203.)

18. The order of the court denying such motion, made upon full proofs, and applicable as affecting a substantial right, is conclusive between the parties. (Id.)

19. After such an order, the plaintiff in the judgment brought an action for the purpose of having the judgment declared to stand as security for another debt not mentioned in the sworn statement upon which it was entered, and to have such statement amended in accordance with the intent and agreement of the parties as alleged by him, but denied upon oath by the defendant: *held*, that while the defendant was concluded by the adjudication upon the motion, in effect that the judgment should stand as security for such further debt, yet the plaintiff could have no affirmative relief. (Id.)

20. A judgment under the Code (§ 274) must, as before, be based upon the pleadings, and is not to be given in favor of a defendant for a cause of action which he has not set up by way of defence or counter-claim. (Wright agt. Delafeld, 25 N. Y. R. 266.)

21. The complaint sought to restrain the prosecution of actions pending against the plaintiff on notes given for the purchase of land, on the ground of de-

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feet of title, and prayed that the defendant might be required to make a good title and convey. There was a pure defence, which prevailed: *Held*, that the complaint should have been dismissed, and a judgment for the defendant for the amount of the notes was reversed. (*Id.*)

22. The whole of a justice's judgment will not be reversed for an error of the justice in allowing a small item of claim—the remaining part of the judgment being correct. The appellate court have full power, under the Code, to reverse in part and affirm in part a justice's judgment for *entire damages*. (*To the same point and effect is Staats agt. Hudson R. R. Co. 23 How. 483.*) (*Decker agt. Hassel, ante 528.*)

23. The sheriff holding an execution against H., M. paid him the amount thereof, in the expectation that the plaintiff in the execution would assign him the judgment, but without the plaintiff's knowledge or any negotiation with him, and the money was not to be returned if the plaintiff should refuse to assign. The sheriff gave M. a receipt, stating that the money was "to apply on the judgment," which is not to be canceled except by M.'s order, if the plaintiff will assign the judgment," which, after a time, he did: *Held*, that this was a purchase, and not a payment, of the judgment. (*Smith agt. Miller*, 25 N. Y. R. 619.)

24. It seems, that an attempted redemption by a judgment-creditor is void, if his affidavit overstates the amount due on the judgment, though the misstatement be casual, and not fraudulent. (*Id.*)

See **APPEAL**, 3. 4.

See **ALIMONY**, 1. 2. 3.

See **EVIDENCE**, 7.

See **RECEIVER**, 1. 2. 3.

See **JOINT DEBTORS**, 1.

See **ACTION IN BARR**, 4.

JUDGMENT CREDITOR.

See **LANDLORD and TENANT**, 1. 2. 3. 4.

See **PARTNERS and PARTNERSHIPS**, 3. 4.

JUDGMENT OF DISMISSAL.

1. It seems, that where it appears on the face of the complaint, that the plain-

tiff brings suit here as a *foreign administratrix*, and the defendant does not take the *objection by demurrer* to the plaintiff's legal capacity to sue, it is waived, under §§ 144, 1847 and 148 of the Code. (*Robbins agt. Wells, court of appeals, ante 15.*)

2. A *judgment dismissing the complaint* at the trial, solely on the ground that the plaintiff has not legal capacity to sue, is not a bar to another action legally instituted by the plaintiff. But it is otherwise, if the judgment of dismissal is on the ground that the *action will not lie against the defendants*. (*Id.*)

3. The mere leave to file a supplemental complaint by the representative of a deceased plaintiff, decides nothing as to the plaintiff's *rights*. But a judgment that the plaintiff in it have leave to prosecute the original action and succeed to all the rights of the first plaintiff, is a different matter. Where the court can see on the face of the supplemental complaint that the former action is fatally defective, it may refuse such judgment. *Per Rosenthal, J.* (*Id.*)

4. It is a mistrial to order that an exception to the dismissal of the complaint be heard in the first instance at general term. (*Hoagland agt. Miller*, 16 Abb. 103.)

5. It is error to refuse a nonsuit, where the uncontradicted evidence for the defense establishes usury. (*Lomer agt. Meeker*, 23 N. Y. R. 381.)

6. That the jury may choose to discredit evidence not impeached and not incredible upon its face, is no reason for submitting it to them. (*Id.*)

7. In an action against maker and indorser of a note, either defendant may have the complaint dismissed at the trial. (*Id.*)

8. In an action to procure the cancelling of a mortgage as having been paid, the pleadings put in issue the fact, but not the amount due; it was determined that the mortgage was not paid, but the sum of \$2,754 was due thereon, and the complaint was dismissed. This adjudication is conclusive upon the parties only of the fact that something was due, but not of the amount. (*Campbell agt. Consalus*, 25 N. Y. R. 613.)

9. It does not affect the principle that the case was tried under a stipulation

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that it might be decided upon the principles of equity, without regard to technical rules or the form of the pleadings, and that the pleadings should be considered as amended to meet the evidence; it not appearing that the mortgagor's answer was, in fact, amended, or regarded as amended, so as to ask affirmative relief. (*Id.*)

See ACTION IN BARR, 3.

JURISDICTION.

1. The supreme court had jurisdiction of equitable actions concerning property, where the amount in controversy was less than one hundred dollars, commenced prior to the act of 1862 repealing the statute depriving the chancellor of such jurisdiction. (*Bramon agt. Johnson, court of appeals*, ante 27.)
2. The constitution of the United States has never invested the President of the United States, either in his civil capacity, or as commander-in-chief of the army and navy, with power to arrest or imprison, or to authorize another to arrest or imprison any person not subject to military law, at any time, or under any exigency, without some order, writ or precept or process of some civil court of competent jurisdiction. (*Jones agt. Seward*, ante 33.)
3. And where an action for damages is instituted in a state court, which brings in question this power to arrest and imprison a citizen of such state, the state court has full power and jurisdiction over the subject. (*Id.*)
4. A controversy which is clearly one of legal cognizance, will never be the subject of equitable jurisdiction, unless facts are stated to show that a perfect remedy at law cannot be obtained. (*Madison Av. Baptist Church agt. Madison Av. Baptist Church*, ante 72.)
5. Mere assertions, threats and designs, made against a grantee of real estate and the party in possession, cannot be deemed a cloud upon the title. (*Unless it be a thunder cloud*.) (*Id.*)
6. If the owner of real property is injured by any false claims or representations in relation to it, he can probably maintain an action for damages against the wrong-doer, if he has incurred any; but the equitable jurisdiction of the court cannot be interposed; and before it will interfere in
- any way in relation to the disputed title, the party in possession must patiently await the commencement of legal proceedings against him. (*Id.*)
7. The courts of this state have jurisdiction of actions for personal injuries inflicted in any of the states of the union, and are bound to entertain such action between citizens of those states. (*McIvor agt. McCabe*, ante 257.)
8. Congress can give the circuit court of the United States original jurisdiction in any case to which their appellate jurisdiction extends. (This decision reverses *S. C. at special term*, ante 38.) (*Jones agt. Seward*, ante 433.)
9. An action by an assignee of the lessor against the assignee of the lessee, for arrears of a perpetual rent reserved by a lease in fee, brings in question the title to real estate; and when upon the trial the plaintiff's claim is disputed, a justice of the peace is ousted of jurisdiction. (*Main agt. Cooper*, 15 N. Y. R. 180.)
10. The Superior Court of the city of New York has jurisdiction of actions for divorce. (*Forrest agt. Forrest*, 25 N. Y. R. 501.)

See BONDS, 7.

See MORTGAGE FORECLOSURE, 7.

See INSOLVENT DEBTOR, 4.

See SPECIFIC PERFORMANCE, 1.

See ORDERS, 1.

See JUDGMENT, 14. 15. 16.

See COSTS, 9.

See CONSTITUTIONAL LAW, 5. 6. 7.

See INJUNCTION, 6. 7. 8. 9. 10.

See CRIMINAL LAW, 20.

See FOREIGN CORPORATIONS, 1.

JUSTICES' COURTS.

1. A notice of appeal from the judgment of a justice of the peace is not such original process as requires a U. S. revenue stamp; and if it does, it may be amended by the court, after review, by affixing the proper stamp thereto. (*Jackson agt. Allen*, ante 119.)
2. An action by an assignee of the lessor against the assignee of the lessee, for arrears of a perpetual rent reserved by a lease in fee, brings in question the title to real estate; and when upon the trial the plaintiff's claim is disputed, a justice of the peace is ousted of jurisdiction.

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dition. (*Main agt. Cooper*, 25 N. Y. R. 180.)

3. The appellate court will not charge a justice of the peace with improperly denying an application for an adjournment of a cause, and not giving any reasons for it at the time, without such error *affirmatively appears*. It will be inferred, in the absence of anything to the contrary, that the justice openly stated his reasons for refusing the adjournment. The whole of a justice's judgment will not be reversed for an error of the justice in allowing a small item of claim—the remaining part of the judgment being correct. The appellate court have full power, under the Code, to reverse in part and affirm in part a justice's judgment for entire damages. (*To the same point and effect is Stadts agt. Hudson R. R. Co.* 23 How. 463.) (*Decker agt. Hassel*, ante 528.)

4. The summary proceeding for the punishment of a defaulting witness or juror in a justice's court (2 R. S. 241, 245), may be had after the termination of the suit in which the default occurred. (*Robbins agt. Gorham*, 25 N. Y. R. 588.)

5. The justice may issue a warrant to bring the offender before him. A previous summons is unnecessary. A process commanding the officer to attach the defaulting juror and bring him before the justice, is a warrant in substance, and sufficient. (*Id.*)

6. The validity of a conviction under this statute is not affected by the omission of the justice to enter in his docket the minute thereof made up by him. (*Id.*)

7. A justice of the peace has no right to issue a warrant of arrest, in a criminal case, upon a complaint stating the facts on information and belief, where the attendance of the person from whom the information was derived can be compelled. And where a justice issues a warrant of arrest on a criminal charge, without sufficient evidence of the commission of the offence by the accused, the justice and the complainant are jointly liable, in an action for false imprisonment. (*Comfort agt. Fulton*, 39 Barb. 56.)

LANDLORD AND TENANT.

1. A lessee and tenant may redeem, by paying or tendering to the landlord the rent in arrear and costs in an action to re-enter for non-payment of rent, whether the action be at common law or under the statute, and may have an action in equity for that purpose. (*Corning agt. Beach*, ante 289.)

2. The proceeding must, however, be taken within six months after execution executed on the judgment in ejectment. (*Id.*)

3. A judgment creditor of the tenant may have an action for relief in equity after re-entry for non-payment of rent, and the leasehold interest will be sold for his benefit, provision being made for compensation and indemnity to the landlord. (*Id.*)

4. This proceeding must be taken within six months after execution executed on the judgment in ejectment. (*Id.*)

5. In an action by a landlord for rent, a breach of his contract to improve or repair the demised premises, may be set up as a counter-claim. Such a breach is no defence to his demand for rent. (*Kelsey agt. Ward*, 16 Abb. 98.)

6. The pendency of four actions for rent, payable quarterly, is no bar to an action to recover rent upon the same tenancy, under a claim that it is payable at the expiration of the year. (*Id.*)

7. A tenant for years erected building: the adjoining owner, by the negligent excavation of his own soil, caused the undermining of the building, which, while the work was in progress, had been sub-let, and the walls fell while in the occupation of the sub-tenant: held, that the original lessor could maintain his action for the injury to the buildings. (*Austin agt. Hudson River R. R. Co.* 25 N. Y. R. 324.)

8. If entitled to remove the buildings on the expiration of his term, there was a direct injury to the tenant's property: if they became part of the freehold, his liability to the landlord for tortious waste entitles him to maintain an action against the wrongdoer. (*Id.*)

9. Besides, as tenant, he had an interest in the use of the building; and landlord and tenant may each maintain an action for the injury to his particular estate. (*Id.*)

10. A tenant took a lease of one having control of the possession, but without title, agreeing that, if the lessor should cease to control or be the owner of the premises by process of law or

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otherwise, no rent should be paid to the lessor or his assigns, unless the person who should then control the premises should, in writing, confirm the lease. The owner accepted a confirmation executed by the owner, and paid rent to successive assignees of the lease, the last of whom, having purchased at a foreclosure sale, but not having received a conveyance, tendered a confirmation of the lease: *held*, that, until the sale is consummated by deed, the rights of the parties as landlord and tenant are not affected by the judgment of foreclosure. (*Whalin agt. White*, 25 N. Y. R. 462.)

11. The tenant, by holding under and paying rent to the successive assignees of the owner, is estopped from denying that they are assignees of his original lessor, and continues bound to pay rent to them in that character, or as having, by the instruments of confirmation, become new lessors. (*Id.*)

12. Where the lessee of premises gives an under-lease for the whole unexpired term, reserving the right to re-enter, it is a sub-lease and not an assignment, and the party giving a sub-lease can re-enter for a breach of the condition, although there is no reversion remaining in him. A lease which by its terms is to end on the 1st day of May, and an assignment of it which is to run to 1st day of (the same) May; the original expires at 12 M. of the 1st day of May, and the assignment expires April 30, at 12 o'clock at night. (*People ex rel. Elston agt. Robertson*, 39 Barb. 9.)

13. A lease in fee, or in perpetuity, is a conveyance of real estate, within the provisions of the statute forbidding the implication of covenants; and if it contains no covenants of *suisin*, warranty or quiet enjoyment, none can be implied. (*Carter agt. Burr*, 39 Barb. 59.)

14. Where a lessee has been evicted from a portion of the premises, by a paramount title in a stranger, he is discharged from the rent *pro tanto*, and is entitled to an apportionment, as to the residue. But in an action for rent, the lessee is not entitled to recoup the value of the lease over and above the rent, nor for the rents he might have realized, or for special damages incurred by reason of being evicted from a portion of the leased premises. (*Id.*)

See **NEGLIGENCE**, 1.

See **SUMMARY PROCEEDINGS**.

See **MARRIED WOMEN**, 14. 15.

LIBEL.

1. "§ 1. No reporter, editor or proprietor of any newspaper shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper of any judicial, legislative, or other public official proceedings of any statement, speech, argument or debate in the course of the same, except upon actual proof of malice in making such report, which shall in no case be implied from the fact of the publication. (*Edsall agt. Brooks, ante* 426.)

2. "§ 2. Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor or proprietor from an action or indictment for any libelous comments or remarks superadded to and interspersed or connected with such report." (*Laws* 1854, ch. 130, p. 314.) (*Id.*)

3. Independently of this statute, the publication of a judicial trial, fairly reported and without express malice, is not actionable. Both at the common law and under the statute, a *privileged* communication or report of a public official proceeding is libelous if there be proof of *actual malice*; otherwise no action will lie. The law will presume malice in all cases where the publication is *not privileged*. (*Id.*)

4. The plaintiff brought his action against the defendants to recover damages for a libel upon him, published in the newspaper of which the defendants are editors and proprietors, in the following words: "BLACK MAILING BY A POLICEMAN.—Isaac W. Edsall, of the twenty-sixth precinct, city hall police, has been dismissed from the public department, by the commissioners, on charges of black mail preferred against him by citizens in three distinct cases." (*Id.*)

5. *Held*, that these remarks or comments of the defendants, superadded to their published history of the trial before the police commissioners, were *not privileged*—were unfair and untrue deductions from the facts disclosed on the trial, and for the publication of which they were deprived of the benefits of the statute and were liable in this action. (*Id.*)

LUNACY.

1. A *guardian or committee* of a *lunatic* appointed under and in pursuance of the laws of another state, where the

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lunatic and guardian reside, cannot be *recognized by our courts*, on an application by the guardian for property belonging to the lunatic in this state. (*Matter of Neally*, ante 402.)

2. *Foreign executors and administrators* may apply here for, and receive, *letters testamentary and of administration*; but our laws have never extended such a privilege to a foreign guardian or committee of a lunatic. Such an appointment can only be made under proceedings instituted in this state to ascertain the fact of lunacy. (*Id.*)

MANDAMUS.

See MUNICIPAL CORPORATIONS, 7. 8.

MARRIED WOMEN.

1. A judgment obtained against a *married woman* in an equitable action to enforce payment out of her separate estate, of a debt arising upon her *guaranty* of the covenant of a third person, in which she charged her "*separate real and personal estate*," can only be enforced in *equity* through a *receiver* in the accustomed manner. Such a contract of the wife is *not valid at law*. (*Charles* agt. *Lowenstein*, ante 29.)

2. An *execution* cannot be resorted to, except to enforce a judgment *at law* against a married woman; and in that case the execution can only reach property in which she has a *legal estate*, and which is of such a nature as to be liable to levy and sale under execution in the same manner as if she were *sola*. (*Id.*)

3. The common law right of the husband as *tenant by the curtesy* is not abolished by the acts of 1848 and 1849, for the more effectual protection of the property of married women; but is subject to be defeated by a disposition of the property by the wife during her life by *deed* or *will*. (*Lansing* agt. *Gulick*, ante 250.)

4. An action given under the Revised Statutes respecting the *determination of claims to land* (2 R. S. 313, §3) is, under the Code, subject to the *same rules* as all other actions; and the *same defences* to defeat the right to such relief may be set up by the defendant, and also equitable relief by way of *counter claim*. (*Peck* agt. *Brown*, ante 350.)

5. Where the plaintiff brought his action as *trustee of an express trust*, (for the benefit of creditors) against the defendant, and the relief demanded in his complaint, in addition to that given under the statute respecting the determination of claims to real property, was that the plaintiff's title might be quieted and adjudged free and clear from any right claimed by the defendant, and other relief. And the defendant claimed said premises under a *full covenant deed*, given and executed to her by her husband, several years before the plaintiff's alleged title accrued, for a good and valuable consideration, and in performance of an agreement to that effect, with intent to settle the *same upon her as her separate estate*, and to vest in her an absolute estate therein, in fee simple: *Held*, on demurrer, to the answer, that the *voidness at law* of a deed directly from a husband to his wife, does not interfere with *equitable rights* which may grow out of such an instrument. (*Id.*)

6. Neither does the act of 1849, which gives a married woman the power of a *feme sole* in certain cases, from which gifts by her husband are simply excluded, prevent the right of the husband to make, or his wife to receive from him, *provision for her support*. And a court of equity does not contravene this statute in the exercise of its equity powers to protect the interest of the wife as a *cestui que trust*, or perhaps a *ward* in chancery. (*Id.*)

7. Although the equity of the wife growing out of the facts, may be considered a *trust*, it is not as such prohibited by the Revised Statutes respecting *uses* and *trusts*, because not enumerated therein, for the reason that it is a *trust arising by implication of law*, to which this statute does not apply. (*Id.*)

8. In this case it is alleged and admitted by the demurrer that the conveyance was made to the defendant in pursuance of a previous agreement for both a good and valuable consideration, and that it was a suitable one, having regard to the property of the husband; equity will therefore sustain such a settlement, even if the plaintiff was a creditor or could claim a creditor's rights. (*Id.*)

9. The court is not bound to *set aside*, on motion, a confession of judgment by a married woman. Unless the equities of the case require interference on her behalf, she will be left to seek relief by action. *It seems* that a judgment entered before the act of 1860, against

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a married woman, and simply for a specified sum of money, is irregular. (*Knickerbocker* agt. *Smith*, 16 Abb. 241.)

10. A married woman, who carries on a separate business (*Laws* of 1860), who purchases goods for the business and uses therein, is liable in an action for the price of such goods. Likewise, if she leases a store for her business, on her separate account, and uses it for that purpose, she is liable for the rent. And an averment in the complaint, that the defendant, a married woman, who carried on a separate business, represented, at the time of making the contract, that it was for the uses of such business, is sufficient upon demurrer. (*Coster* agt. *Isaacs*, 16 Abb. 328.)

11. It is necessary, in an action against a married woman, to allege in the complaint, the facts creating her peculiar liability respecting her separate estate. In all cases of judgment against her, it should be expressly stated therein, that the amount is "to be levied or collected out of her separate estate, and not otherwise," and the execution should follow the judgment in its terms. (*Baldwin* agt. *Kimmel*, 16 Abb. 253.)

12. A mere absolute judgment in *personam* against a married woman, recovered prior to 1862, is not sufficient to entitle the creditor to sue her thereon, and recover a judgment against her separate property. The creditor must also establish that the original cause of action was such as to entitle the plaintiff to a judgment against her separate estate. (*Id.*)

13. An action against a married woman will lie to charge her separate estate with damages which have resulted from her *breach of covenants of warranty* in conveying real estate owned by her. (*Kolle* agt. *De Leyer*, ante 468.)

14. The estate of a *tenant by the curtesy*, has survived the acts passed in 1848 and 1849, "for the more effectual protection of the rights of married women." (*Id.*)

15. Those acts were intended to allow a married woman to take and hold real and personal property to her separate use, free from the control or disposal of her husband, and free from all liability for his debts, and to enable her to make an effectual disposition of it by deed or will, and thus to place it if she chooses, wholly beyond the power or reach of her husband; but if she omits to exercise her right of disposal, the acts are not intended to interfere with the laws of descent, in respect to the *real estate*, or the laws giving the husband the right of succession to the *personalty*. (*Id.*)

16. The disability of a husband to take land by conveyance from his wife, is not removed by the statute (ch. 375 of 1849) enabling her to devise and convey as if she were unmarried. (*White* agt. *Wager*, 25 N. Y. R. 328.)

17. *Held*, accordingly, that a deed executed by a wife, in contemplation of death, to her husband, in good faith and voluntarily, was wholly ineffectual. (*Id.*)

18. A power to mortgage, reserved to a married woman in respect to land held in trust for her separate use, will support a mortgage to secure her husband's debt. (*Leavitt* agt. *Pell*, 25 N. Y. R. 474.)

19. A married woman can charge the whole or a portion of her separate estate, as a surety for her husband, the intention to charge such separate estate being declared in the contract. And although the instrument by which she promises to pay the debt of her husband out of her separate estate, declares that the consideration is for the benefit of her separate estate, instead of stating the real consideration, this will not vitiate the instrument or exempt her separate estate, if she expressly charges her separate estate in the instrument. (*Barnett* agt. *Lichtenstein*, 39 Barb. 194.)

20. Where a marriage settlement, in itself, provides for the payment of all existing debts, and such debts are actually paid, in pursuance of it, it is not fraudulent in law. In such a case, as to all subsequent creditors, such a settlement is not presumptively fraudulent in fact. (*Dygart* agt. *Reimers-Schneider*, 39 Barb. 417.)

21. Where by a *parol ante-nuptial agreement*, the intended husband agreed on his part, to convey certain real estate to his intended wife, and she, in consideration thereof agreed to marry him, and pay his existing debts, and after the marriage the husband conveyed the land to *E*, for the benefit of the wife, and she paid her husband's debts out of her individual earnings

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and separate estate, held, that this was a contract of purchase, as to the real estate, and was not a voluntary settlement. That whether the agreement, when executed, was to be regarded as a voluntary settlement or a purchase, the right of the wife was in equity to be preferred to the claim of a subsequent judgment creditor of the husband. (*Id.*)

See WILL, 16.

MORTGAGE.

1. The assignee of a mortgage takes it subject to all equities existing in favor of the mortgagor, or of any person who succeeds to his estate, at the time of the assignment. (*See S. C. 24 How. Pr. R. 505.*) (*Hartley agt. Tatham, ante 158.*)
2. Therefore, where the assignee of a contract for work and labor, which the mortgages of the premises had agreed with the assignor of the contract to allow on the mortgage, when completed, and the assignee having also acquired the title of the mortgagor to the mortgaged premises: Held, that although the mortgages had assigned the mortgage, the assignee of the premises and the owner of the debt due upon the contract could not only require the mortgagee, while he held the mortgage, but his assignee afterwards, to deduct the amount of such debt from the mortgage. (*Id.*)
3. And such assignee and owner is not estopped from asserting such equity, by reason of his immediate grantor of the premises having assumed the mortgage for the whole amount and agreed to pay it. There being no covenant by the grantee which would run with the land and bind those who succeeded to his estate, it was a mere personal obligation, implied by the acceptance of the deed, and upon which an assump^sit could be raised in favor of the holder of the mortgage. The owner of the premises, at the time of the foreclosure of the mortgage, stands in no relation of surety in respect to the mortgage debt, and cannot in any way be affected by the purely personal obligation of his grantor. (*Id.*)
4. Besides, the doctrine of estoppel does not apply to such a case, because the deed to the owner's immediate grantor, in which the payment of the whole mortgage was assumed, was executed and delivered before the contract for the work and labor with the mortgages was made, when the whole mortgage debt was due. This equity arose afterwards; and the plaintiff having purchased the mortgage after this equity accrued, took it subject thereto. (*Id.*)
5. A power to mortgage, reserved to a married woman in respect to land held in trust for her separate use, will support a mortgage to secure her husband's debt. (*Leavitt agt. Pell, 26 N. Y. R. 474.*)
6. After forfeiture of a mortgage of personal property, if the mortgagor sells the property to a third person, with the consent of the mortgagor, it will be equivalent to a formal foreclosure of the equity of redemption. When the mortgagor is in default in not paying the mortgage debt, the mortgagee has a right to take the property into his possession and dispose of it at his pleasure. The title of a purchaser cannot be assailed by creditors of the mortgagor having no lien upon the mortgaged property at the time of his purchase. The want of possession in the mortgagee is not sufficient evidence, of itself, to authorize the presumption of fraud. (*Talman agt. Smith, 39 Barb. 390.*)
7. Where a mortgage is made to two persons, describing them as "executors," but the money is made payable to them or their personal representatives, it is the duty of the county clerk or register to receive and record a certificate of the payment of the mortgage, duly executed by the surviving executor, on actual payment of the money to him. (*Peoples agt. Keyser, 39 Barb. 587.*)
8. Where, after a debt secured by a chattel mortgage has become due, and a forfeiture has occurred by reason of nonpayment, the title of the mortgages is absolute, and the mortgagor has no interest in the mortgaged property which is liable to be sold on execution against him; although the property has been suffered to remain in the possession of the mortgagor, after forfeiture. (*Champlin agt. Johnson, 39 Barb. 606.*)
9. There must be an eviction, or something equivalent thereto, to enable a mortgagor to defend against the mortgage, on the ground of a failure of the consideration, or the title conveyed by the mortgagee. (*Curtis agt. Rush, 39 Barb. 861.*)

See CONTRACTS, 11. 12. 13. 14. 15.

See SURETY, 2.

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MORTGAGE FORECLOSURE.

1. Every person whose rights are injuriously affected by a judgment or proceedings under it, in a *foreclosure suit*, has the right to move the court to set aside or amend them, although he is not a party to the suit. (*Gould agt. Mortimer, ante* 167.)
2. And if the party is so connected with the foreclosure suit as that he could have moved in that suit to set aside the sale, then he cannot maintain an action to accomplish that object. His remedy is by motion in the original suit. (*Id.*)
3. A sale by a referee, executing a judgment of the court in an action of foreclosure, is within that section of the statute of frauds which provides that no estate or interest in lands shall be granted unless by act or operation of law, or by deed of conveyance in writing subscribed by the party making the same. (*Willets agt. Van Alst, ante* 325.)
4. But the transaction between the referee and the successful bidder, on such sale, is not to be regarded as a *contract*, and is not within that section of the statute, requiring contracts of sale to be subscribed by the seller of the land. (*Id.*)
5. In such a case the referee acts as the minister of the court, and although no action could be maintained against the purchaser on the memorandum subscribed by him at the foot of the conditions of sale—a *quasi contract*, lacking essential elements of a contract, parties, mutuality, consideration; yet that was really a submission to the jurisdiction of the court in the foreclosure suit—a consent to the exercise of the powers which courts of equity assert *ex proprio vigore* over purchasers. (*Id.*)
6. A purchaser having deposited the 10 per cent. with the referee and failed to complete, and a second sale having been made for a much less sum, the percentage so paid into court will be applied towards the payment of such deficiency. (*Id.*)
7. Where one claiming under such defaulting purchaser as the owner of the bid, becomes the owner of the judgment and obtains an order in the cause giving him the right to complete the purchase, but fails to do so to the prejudice of a subsequent inquirer, the court, at special term, has no power to postpone the payment of the judgment out of the proceeds, and to apply the moneys, in the first instance, to the satisfaction of subsequent liens. (*Id.*)
8. The purchaser at a mortgage sale under an attempted statutory foreclosure, void as against the mortgagor for want of notice, stands as an assignee of the mortgage. (*Robinson agt. Ryan, 25 N. Y. R. 320.*)
9. It seems that this is sufficient evidence of his title, in a foreclosure suit by such assignee to which the mortgagor is not a party, as against a grantee of the land, subject to the mortgage. (*Id.*)
10. The land was subject to re-entry for non-payment of rent due on a lease in fee. The mortgagor had covenanted with the mortgagor to pay such rent to the landlord; but the mortgagor, by a subsequent agreement with the mortgagee, assumed the payment of such rent: *Held*, that, as against a grantee with notice of the agreement, the assignee of the mortgage was entitled to pay the rent to protect his interest; to tack the amount to his mortgage, and to foreclose as for a sum immediately payable, though no part of the principal was due on the mortgage. (*Id.*)
11. Although it is sufficient, *prima facie*, for the plaintiff in ejectment to show a right of possession in himself, under a foreclosure sale, yet if the defendant can show an equitable right to the possession in a third person, under whom he claims, this evidence is legitimate and proper, and constitutes a complete equitable defence to the action. (*Safford agt. Hynds, 39 Barb. 625.*)

See PRINCIPAL and AGENT, 21.

MUNICIPAL CORPORATIONS.

1. The *common council of the city of New York* have no authority, under the act of the legislature, passed April 6, 1832, entitled "An act to amend an act entitled an act to incorporate the New York and Harlem Railroad Company" passed April 25, 1831, to grant to or permit said railroad company the right to lay or construct a railroad track or tracks in Fourth avenue, Madison avenue, Union square, Broadway, Fulton street, John street, Whitehall street, in the city of New York, or any of them: (*People agt. N. Y. and Harlem R. R. Co., ante* 44.)

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2. Because, 1st. Such a route would be an entirely *new and independent route*, as much so as if pursued under independent authority from the legislature, it being in effect a parallel route, which the legislature have in the 16th section of the act of 1831 reserved to themselves the right to grant to a distinct corporation. 2. Nor is the proposed new route in any just sense a *mere extension* of the original railroad, as provided by said act of 1832. (*Id.*)

3. The right or claims of the city of New York, or of a *railroad company* running through said city, to the use or privilege of the *streets* of the city, must be regarded as conclusively settled by the *court of appeals* in the case of *The People agt. Kerr* (25 *How. Pr. R.* 258.) (*N. Y. & Harlem R. R. Co.* agt. *Forty-Second street, &c. R. R. Co.*, ante 68.)

4. The interest which the New York and Harlem Railroad Company have in the *Fourth avenue* of the city of New York is a *right of way*; its franchise consists in its right to lay and use exclusively a railroad, subject to the duty of running public cars thereon. It has no control or interest whatever in that part of *Fourth avenue not occupied by its own road, except that common to the rest of community*; that is, that it shall be kept free and clear for public use. (*Id.*)

5. Consequently, the railroad company cannot by action, *restrain another railroad company* from laying a track for public use in *Fourth avenue*, each side of the plaintiff's railroad, so long as the action of the second railroad company is not *malicious*, although there may be difficulty of access to the plaintiff's cars by reason of the second railroad. (*Id.*)

6. Municipal corporations or individuals, where charged with a duty, as in the case of *streets or highways*, are bound to keep the streets and highways in a proper state of repair, and free from all obstructions or defects, and to exercise a general oversight in regard to their condition and safety, and they, or the body they represent, are liable for all injuries happening by reason of their negligence. And whether or not the work or repairs are being done by a contractor under them, they are liable for the negligence of whose servants causes the injury complained of. (*Wendell agt. Mayor, &c. of Troy*, 39 *Barb.* 829.)

7. In all cases where an officer of a corporation refuses to comply with the lawful directions of the corporate body, and a mandamus is sued out by the party for whose benefit, and in whose favor the directions are given, with the consent of the corporate body, the party will be relieved in that manner, without being put to an action against the corporation, for a specific performance. Where T. offered to sell to the city of New York certain property, either for cash or corporate bonds, and the corporation, by resolution accepted the offer, the payment of the price to be made in corporate bonds, *held*, that this constituted an agreement whereby payment was to be made in bonds; and that there being no legal remedy other than a mandamus, by which the vendor could obtain the bonds, that remedy, against the comptroller, who refused to execute or deliver the bonds, was appropriate. (*People agt. Breman*, 39 *Barb.* 522.)

8. The act of April 24, 1863, directing the mayor and comptroller of the city of New York to designate four papers "having the largest daily circulation," in which corporation advertisements shall be published, requires the designation to be of the four papers published in the city, having the largest daily circulation, and is not to be so construed as to restrict such circulation to the city and county of New York. If the comptroller refuses to meet the mayor, and act with him in the matter, a mandamus will lie to compel him to such action, although it should not issue to command the comptroller to unite with the mayor in designating four certain papers named therein. (*People agt. Breman*, 39 *Barb.* 651.)

See **NEGLIGENCE**, 2. 3.

NEGLIGENCE.

1. The owner of real property in a city, who makes a *coal vault* under the sidewalk opposite the premises, for his own convenience, is not relieved from liability for injuries received by a citizen, who, in passing over it with ordinary care, falls through an *insecure circular grating* leading to such vault, although he has demised the premises to a *tenant* who had had for several years and then was in possession of the premises; and although there was some evidence to show that at the time of the accident such grating was left out of its place by the tenant, who had just previously

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used it. (*Anderson agt. Dickie, ante 105.*)

2. A municipal corporation, having the legal power and duty and the means to construct and keep in repair their streets and sidewalks, are liable to a person who is injured by their neglect to make necessary repairs. And such corporation are liable for injuries sustained by reason of an unguarded excavation or area, made within the bounds of the highway by a private person, and which the corporation, after notice, neglect to guard or repair; and such notice may be inferred from the lapse of time. (*Davenport agt. Buckman, 16 Abb. 341.*)

3. A person who comes into possession of premises upon which there is an excavation encroaching upon the highway, may be regarded as sanctioning it, and is liable for an injury sustained by a passer-by in consequence of it. The fact that he had, before the accident, leased the premises to another does not alter the case. (*Id.*)

4. A master is not chargeable for injuries to one servant by the negligence of another, on the ground of the unskillfulness of the latter, unless the injuries resulted from such unskillfulness. (*Wright agt. N. Y. Central R. R. Co. 26 N. Y. R. 582.*)

5. The principles regulating the liability of the master for injuries to one servant caused by another, or by the defects in machinery and implements furnished, or arrangements prescribed, by the master, stated, *per ALLEN, J.* (*Id.*)

See *LANDLORD and TENANT*, 7. 8. 9.
See *MUNICIPAL CORPORATIONS*, 6.

NEW TRIAL.

1. After a judgment entered *absolutely*, a motion for a new trial on a case or exceptions cannot be heard at *special term*. (*Anderson agt. Dickie, ante 199.*)

2. If the judgment is to be reviewed on appeal at general term on a case or exceptions, the appellant must procure an *order of the court* authorizing the case or exceptions to be annexed to, and to form part of the *judgment roll*. (*Id.*)

3. Until this is done, the respondent has a right to notice the cause for argument and put it on the calendar of the general term, before the expiration of

the time for filing the case or exceptions, after settlement. (*Id.*)

4. The court, at special term, has authority to grant new trials for errors in law committed by the judge at the circuit. (*Potter agt. Chadsey, 16 Abb. 146.*)

5. On the trial of an action to recover possession of *real estate*, the plaintiff introduced in evidence a judgment roll of this court, by which it appeared that in an action in this court against the plaintiff in this action, by which the plaintiff in that action claimed title to the premises, it was adjudged in that action that the title to the premises was legally in the defendant, the plaintiff in this action, whereupon the court considered that the judgment given in evidence was conclusive as between the parties of the plaintiff's right to recover the premises, and gave judgment for the plaintiff, and the defendant moved for a new trial, on exceptions, including this ground, with others, which was denied by the general term, for the reason that the question of title was *res judicata*. And after the decision of the general term, the court of appeals *reversed* so much of the judgment which was given in evidence in this action, as determined any question of title between the parties. (*Gilchrist agt. Comfort, ante 394.*)

6. Held, that the defendant in this action was entitled to his motion to set aside the order denying the motion for a new trial, together with the judgment which had been entered; also, allowing a re-argument of the remaining points contained in his exceptions. (*Id.*)

7. Calicoes were furnished by the plaintiff to S., who printed them under an agreement by which they were to be sold, and the proceeds, after reimbursing the plaintiff's advances and commissions and the original cost of the cloth, were to be paid to S. While they were in the hands of a factor for sale, the sheriff, having an attachment against S., served notice thereof on the factor, and required of him a certificate of the advances for which the factor claimed a lien, and left them in his possession, and he sold them. Assuming the general property of the goods to have been in the plaintiff held: (*Wood agt. Orser, 25 N. Y. R. 348.*)

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8. This was not such an assumption by the sheriff of control over the goods, as the property of S., as to render the sheriff liable to the plaintiff as a trespasser. (*Id.*)
9. The factor having the right of possession, with a lien for advances, the plaintiff could not maintain replevin. (*Id.*)
10. The circuit judge directed a verdict for the plaintiff for the value of the goods, less the factor's advances and commissions. This was error. (*Id.*)
11. The jury, in their verdict, assessed the value of the goods, and stated that this was to be reduced by the factor's advances and charges, which they did not assess. This was not a verdict on which any judgment could be rendered; and receiving it was also error. (*Id.*)
12. The case went to the general term on exceptions, in the first instance, where a new trial was denied, and the court ordered a reference to ascertain the amount of the factor's advances, by which the verdict should be corrected. This was also error. (*Id.*)
13. The court had no power to order such reference. A new trial was necessary, and could not be had at general term. (*Id.*)
14. The trial of issues of fact in a divorce case is reviewed, and a new trial granted or refused, not upon the principles applicable to a strict bill of exceptions, but on those which governed a court of equity. Unless the errors are such as to render the trial an unfair one, or substantially affect the verdict, a new trial will be denied. (*Forrest* agt. *Forrest*, 25 N. Y. R. 501.)
15. The supreme court, at general term, upon appeal from that part of a judgment for divorce fixing the plaintiff's alimony, may, it seems, order a reference to ascertain the sum proper to be allowed. (*Id.*)
16. The adjustment of the allowance is an act of judicial discretion, to which the reference is merely ancillary; and exceptions to the report of the referee, or to his admission or rejection of testimony, are not reviewable in this court. (*Id.*)

See EVIDENCE, 9.

See FALSE IMPRISONMENT, 5.

NON-SUIT.

1. It is error to refuse a nonsuit, where the uncontradicted evidence for the defense establishes asury. (*Loemer* agt. *Meeker*, 26 N. Y. R. 361.)
2. That the jury may choose to discredit evidence not impeached and not incredible upon its face, is no reason for submitting it to them. (*Id.*)
3. In an action against maker and indorser of a note, either defendant may have the complaint dismissed at the trial. (*Id.*)

NOTICE OF APPEAL.

1. A notice of appeal from the judgment of a justice of the peace is not such original process as requires a U. S. revenue stamp; and if it does, it may be amended by the court, after review, by affixing the proper stamp thereto. (*Jackson* agt. *Allen*, ante 119.)
2. The Code (§ 332) limits the time within which appeals may be taken, to thirty days; and unless the notice of appeal is actually served on the clerk within that time, the right to appeal is lost. (See *Crittenden* agt. *Adams*, 5 How. Pr. R. 810, also holding that the time of service of notice of appeal upon the clerk, when made by mail, does not date from the time of depositing in the post-office.) (*Morris* agt. *Morange*, ante 247.)
3. When the notice of appeal was mailed to the clerk on the thirtieth or last day for bringing the appeal, but not actually received by the clerk until four days afterwards, held, that the notice of appeal was insufficient to give the appeal effect; and the court had no power to grant any relief to the appellant by which he could make his intended appeal effectual. (*Id.*)

See SERVICE, 1. 2.

NOTICE OF ARGUMENT.

See CALENDAR, 1. 2. 3.

See SERVICE, 1. 2.

NOTICE OF MOTION.

1. On a motion to set aside a judgment for irregularity, the notice of motion must specify the irregularity. Otherwise, it is sufficient ground for denying the motion. And where the irregularity is not specified in the notice, and

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the motion is denied, the appellate court may presume that the motion was denied on the ground of the defect in the notice. (*Lewis agt. Graham*, 16 Abb. 126.)

NUISANCE.

1. Where a person erects a building upon a line of his own premises, so that the eaves or gutters project over the land of the adjoining owner, this is not such an encroachment upon the possession of the latter as will sustain an action of ejectment. An action for a nuisance is the appropriate remedy. (*Aikin agt. Benedict*, 39 Barb. 400.)

ORDERS.

1. An order requiring the adverse party to appear before the officer and attend the examination of a witness (before trial), is an order made out of court, and without notice; and the Code expressly authorizes such an order to be made by any judge of the court, in any part of the state. (*Bank of Silver Creek agt. Browning*, 16 Abb. 272.)

PARTIES.

1. Every person whose rights are injuriously affected by a judgment or proceedings under it, in a *foreclosure suit*, has the right to move the court to set aside or amend them, although he is not a party to the suit. (*Gould agt. Mortimer*, ante 167.)
2. And if the party is so connected with the foreclosure suit as that he could have moved in that suit to set aside the sale, then he cannot maintain an action to accomplish that object. His remedy is by *motion in the original suit*. (*Id.*)
3. Where the plaintiff shows that he will be entitled to final relief by injunction or otherwise against any person, although such person is not a party to the contract alleged to be violated, he is properly made a *party defendant*. (*Hammer agt. Barnes*, ante 174.)
4. Persons having no interest in the controversy, although they are general partners of the plaintiff, cannot properly be made *parties plaintiff*. (*Id.*)
5. Persons who have acquired from the defendants a knowledge of a secret invention for which the plaintiff claims

protection, are not necessary parties. (*Id.*)

6. An action to recover penalties by "The Board of Trustees of the Fire Department of the Eastern District of the City of Brooklyn," which are authorized to be brought in their own name, under the act of 1860 (*Laws 1860, ch. 472*), must be brought in the individual names of the trustees, with the addition of their name of office—not by the designation of their official title merely. (*Trustees Fire Department, Brooklyn agt. Acker*, ante 283.)
7. A party to an action is one named upon the record as plaintiff or defendant. Where the nominal defendant was the president of a joint stock company, and the claim in suit was one against the company only; it was held, that he was the party defendant, and might be required to submit to examination as a party. (*Woods agt. DeFiganiere*, 16 Abb. 1.)
8. It does not invalidate an order for the examination of the adverse party before the trial, that it does not appear by affidavit that the cause is at issue. To punish a party for contempt in refusing to be examined under §§ 390, 393 of the Code, it need not appear that his misconduct was calculated to, or did, defest, impair, impede or prejudice the rights or remedies of any party, as required by statute (2 R. S. 538 § 20) in ordinary cases of contempt. (*Id.*)
9. A party to an action, when examined as a witness before the trial, under § 390 of the Code, cannot be compelled to produce documents as evidence. (*Woods agt. DeFiganiere*, 16 Abb. 159.)
10. The term "parties" in the sense of the rule which renders a prior judgment conclusive upon those who sustain that character, is not restricted to those who are parties upon the record. But it includes all who have a direct interest in the subject matter of the suit, and a right to make a defence, or control the proceedings. Thus, where assignees succeeding to the real estate of a judgment debtor had information of a motion made to correct the docket of the judgment, so as to give it effect by relation back to a time anterior to the assignment, and they neglected to present their rights to the court, it was held, that they were bound by the de-

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cision granting the motion. (*Burr* agt. *Bigler*, 16 Abb. 177.)

11. The examination of the adverse party before trial, under § 391 of the Code, is in the nature of a cross-examination, and governed by similar rules. The limit of a cross-examination is within the discretion of the judge conducting it. (*Plato* agt. *Kelly*, 16 Abb. 188.)

12. The indorsee of a note, for a consideration not to be paid till the note should be collected, is the real party in interest to maintain an action thereon. (*Cummings* agt. *Morris*, 25 N. Y. R. 625.)

See CERTIORARI, 1.

PARTNERS AND PARTNERSHIPS.

1. Where one partner on retiring, relinquishes to his copartner "the business connections and patronage belonging to the firm," it may be deemed to include the goods of the concern. (*Kellogg* agt. *Totten*, 16 Abb. 35.)

2. Joint owners of a vessel, not otherwise partners, are in respect to such vessels, tenants in common. And one of them may sue for his share of a demand due the owners, without joining his co-tenant, whose share has been paid. (*Bishop* agt. *Edmiston*, 16 Abb. 466.)

3. In the absence of fraud, one member of a firm may, notwithstanding the protest of his partner, transfer all the property of the partnership, in consideration of the promise of the purchaser to pay its debts, though not yet due. (*Graser* agt. *Stellwagen*, 25 N. Y. R. 315.)

4. The question of fraud cannot be raised by one claiming adversely to the sale who does not, by the pleadings, show himself to be a creditor or purchaser, and who upon the trial appears to be only a creditor at large. (*Id.*)

5. In order to found an exception upon the omission of the judge to submit the question of fraud to the jury, the party must, it seems, ask to have it so submitted as well where the case is within the statute of fraudulent conveyances (2 R. S., p. 137, § 4), as in other cases. (*Id.*)

6. A complaint, stating a promissory note, whereby the maker promised to pay the defendants named, "trading

and doing business under the partnership name, or firm of "C. I. & Co." and that said note was "duly indorsed by said defendants by their said partnership name," sufficiently avers the partnership: an answer, denying "the indorsement in the complaint alleged," does not put the partnership in issue. (*Anable* agt. *Conklin*, 25 N. Y. R. 484.)

7. Held, accordingly, that evidence, offered by one of the defendants, that he was never a member of the firm of C., I. & Co., was inadmissible. (*Id.*)

8. Until an order is made for the appointment of a receiver, the property of an insolvent limited partnership is liable to the execution of a creditor recovering judgment otherwise than by confession, and he may thus obtain a preference. (*Van Alstyne* agt. *Cook*, 25 N. Y. R. 489.)

9. The execution binds the partnership property, though the action is brought against the general partners only. (*Id.*)

10. Held, accordingly, that, where an action was commenced by one of the partners for the dissolution of the partnership and the distribution of its effects, and before the order for the appointment of a receiver, the sheriff levied on partnership property the execution of a creditor who had obtained judgment by default, the title of the creditor to the avails of such property was not overreached by that of the receiver. (*Id.*)

11. One of a firm of warehousemen falsely represented to a person who advanced money on the faith of such representation, that the one to whom the money was advanced and to whom he had given receipts in the firm name, had on storage with the firm a certain quantity of grain. The innocent partners are bound by the representation, and responsible for the money advanced. (*Griswold* agt. *Havens*, 26 N. Y. R. 595.)

12. Where an agent or partner makes a representation of a fact outside the terms of his power, and which, from its nature, rests peculiarly within his knowledge, upon the faith of which another party acts, the principal or firm is precluded from controverting the fact so alleged. (*Id.*)

13. Accordingly, when the party advancing the money, having demanded the grain, brought his action, not for dam-

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ages for the fraud, but as for a conversion of the grain represented by the receipts, the plaintiff was held entitled to recover, though evidence was improperly received showing that such grain never had an existence. (*Id.*)

14. The criterion of value and measure of damages, it seems, is the market value of ordinary merchantable grain, of the kind alleged to have been in store. (*Id.*)

15. If a special partner does not pay in cash, the amount of capital agreed to be contributed by him, but makes the payment in goods, &c., it is not a compliance with the statute respecting limited partnerships. If the provisions of the statute are not complied with, the limited partnership is not formed, and if a false affidavit in respect to the payment in cash of the sums alleged to have been contributed by the special partners, is filed, all the partners will be liable for all the engagements of the partnership as general partners. (*Haviland* agt. *Chace*, 39 *Barb.* 283.)

16. One copartner cannot, after the dissolution of the firm, bind his copartner by a new promise, or revive a debt barred by the statute of limitations, by a promise, or by a payment of principal or interest, made either before or after the lapse of the six years mentioned in the statute. What the joint makers of a promissory note may not do to enlarge, prolong or continue existing liabilities, or to create a new one in regard to the debt, copartners, after dissolution may not do. (*Payne* agt. *State*, 39 *Barb.* 684.)

PARTITION.

1. The common law right of the husband as *tenant by the curtesy* is not abolished by the acts of 1848 and 1849, for the more effectual protection of the property of married women; but is subject to be defeated by a disposition of the property by the wife during her life, by deed or will. (*Lansing* agt. *Gulick*, ante 250.)

2. An action of *partition* cannot be prosecuted by or in behalf of an *infant* as plaintiff, without the appointment by the court of a *next friend*, pursuant to the act of 1852. (*Id.*)

3. Such next friend must give security, as required by that act. (*Id.*)

4. An appointment of a *guardian* to protect the interest of an *infant* plaintiff in partition, under section 116 of the Code of Procedure, is a *nullity*. (*Id.*)

See ANSWER, 4.

PARTITION FENCES.

1. There may, it seems, be a valid prescription binding the owner of land to maintain perpetually the fence between him and the adjoining proprietor. (*Adams* agt. *Van Alstyne*, 25 *N. Y. R.* 232.)

2. In such case, the fence viewers have no jurisdiction under our statutes. (*Id.*)

3. The maintenance of a fence by one of the adjoining proprietors exclusively for more than twenty years, when he might have compelled the other to maintain part, warrants the presumption of a grant or covenant compelling him to do so. (*Id.*)

4. But no such prescription can be established in respect to part of a boundary line by the maintenance for any length of time, since our statutes requiring fencing of the fence thereon by one of the adjoining proprietors, while the other maintained an equal length on another portion of the boundary. (*Id.*)

5. The presumption in such case is that each maintained what had been found by agreement to be his just proportion of the fences, in discharge of his own duty, and not in exoneration of the other. (*Id.*)

6. Such a division, it seems, is binding upon the parties while they remain contiguous possessors; but new obligations arise when, by subdivision or otherwise, there is a change in the extent to which one of the adjoining proprietors borders upon the other. (*Id.*)

7. The statute empowering fence viewers to fix the just proportion of fence to be maintained refers to the state of things existing when they are called upon to act, and has no relation to any former ownership of the adjoining possessions. (*Id.*)

PAYMENT.

See JUDGEMENT, 23. 24.

See MORTGAGE, 7.

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PENALTY.

1. Where a statute imposes a penalty for continuing a violation of it, after an official notice to remove the violation, it should be construed to require a notice which shall be explicit in respect to the nature of the violation. This principle is particularly applicable to the laws relating to the inspection of buildings and the prevention of fires in the city of New York. (*Law of 1862, 574, ch. 356.*) (*Fire Department agt. Williamson, 16 Abb. 195.*)

PLACE OF TRIAL.

1. A demand to change the place of trial to the proper county, followed by a stipulation of plaintiff changing to a proper county, but not the one demanded, is effectual to change the place of trial "by consent of parties," within the meaning of § 126 of the Code. Any informality in such stipulation served, is waived by the defendants retaining it without objection. (*Philbrick agt. Boyd, 16 Abb. 393.*)

POLICE.

1. The relator having been convicted, by the board of metropolitan police, of being *absent from duty* for a certain prescribed period, and at the time of such conviction the law made the offence punishable only in case of absence from duty *without leave*: Held, that the return to the common law *certiorari* bringing up such conviction, not showing that the absence was *without leave*, the relator was convicted of no offence. (*People ex rel. Cook agt. Board of Metropolitan Police, ante 182.*)

2. Besides, it was wholly inconsistent to find the relator guilty of neglect of duty for absence during the time the board had *unlawfully dismissed him from service*. (*Id.*)

3. Where a *complaint* is susceptible of no other interpretation than a charge of *illegal arrest, detention and restraint of liberty*, the action is one of *false imprisonment* and not of malicious prosecution. (*Burns agt. Erben, ante 273.*)

4. The Metropolitan police act allows the officers of police to *arrest persons suspected by them, without warrant*, where there is reason to believe a *felony* has been committed. (*Id.*)

5. Where the plaintiff in an action for false imprisonment has, upon the evidence recovered nominal damages against a police officer for arresting her on a charge of felony, the court on appeal will not interfere with the judgment. (*Id.*)

6. The board of supervisors of the city and county of New York have authority to fix or increase the salary of the clerk of a police court; especially if such increase is made by an act of the legislature, or is subsequently ratified by them. The change of the appointing power, for these clerks, from the Mayor, &c., to the board of police does not relieve the corporation from liability to pay whatever it was bound to pay before. (*Devoy agt. Mayor, &c., of New York, 39 Barb. 169.*)

7. The rules of the commissioners of the Metropolitan police providing that certain officers in their employ shall "be deemed always on duty," cannot control or alter the meaning of the 34th section of the act of 1860 which declares that no person holding office under that act shall be liable to arrest on civil process, or to service of subpoenas from civil courts, "whilst actually on duty." Though they may be *deemed* to be on duty, yet if they are not *actually* on duty, the officers are liable to arrest, and to be served with subpoenas. (*Hart agt. Kennedy, 39 Barb. 186—affirming S. C. at special term, 23 How. Pr. R. 417.*)

PRINCIPAL AND AGENT.

1. A general and correct definition of the term "agency" implies the power to do just what the principal has authorised, and no more. (*Farmers', &c. Bank agt. Butchers' and Drovers' Bank, court of appeals, ante 1.*)

2. If the power to act is conferred by *writing*, then the instrument will define what the power is, and the extent of it; and if by *parol instructions* to do a particular act or series of acts relating to a particular business or subject, then the authority must be ascertained from the express instructions given, and such implied authority as may be necessary to give them effect. (*Id.*)

3. If the agency arises, as it must in many cases, where there is no written authority, and no express parol instructions, from the relation which the agent maintains towards his principal,

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and the nature of the employment, it is obvious that the extent of the powers to bind the principal must depend upon other elements—such as the character of the relation; the nature of the employment; the custom and usage of the business; and the recognition and acquiescence; which must each of them, enter largely into the consideration of the extent of the agent's authority. And this principle is peculiarly applicable to the class of agencies represented by the officers of corporate companies. (*Id.*)

4. In determining the nature and extent of the authority which this latter class of agents may rightfully exercise, the courts may take judicial notice and recognise the general course of the banking business as it is now conducted, and the universal practice of these employed to conduct it. They may know that the circulating notes are signed by the presidents and cashiers; that the deposits are received and paid out by the clerks, tellers and cashiers; and the certificates of deposits, and the certificates upon the face of checks drawn by the dealers and depositors, are signed by the same class of officers, or by one of them. (*Id.*)

5. The authority of this class of agents to do these acts within the walls of the banking institutions and at their counters, is never the subject of inquiry or examination. It is never doubted or questioned, but is presumed from the nature of the employment and the necessities of the business. (*Id.*)

6. The rule that he who deals with the agent of another is bound to look into the agent's commission for the measure of his authority, must have a qualified application to an agent with a general power, coupled with a limitation not patent or open to common observation. (*Id.*)

7. Therefore, where the teller or other proper officer of a banking corporation, representing it and doing its business at the counter, certifies checks of its dealers and depositors drawn upon it in the usual form under a general power to certify, such banking corporation is responsible to holders in good faith and for value, notwithstanding private directions not to certify in the absence of funds without special permission. (*Id.*)

8. A contract made for the employment of an agent or clerk, at a specified

salary for one year, is an entire contract, and cannot be lawfully terminated within the year without justifiable cause. (*McDonald agt. Lord, ante 404.*)

9. An agent must faithfully serve his principal. He is bound to the exercise of all his skill, ability and industry in favor of his principal. As an agent to sell, it is his duty to get the highest fair price; and this duty is wholly incompatible with his wish to buy from his principal. (*Id.*)

10. No agent or trustee can deal with the subject matter of his trust, except for the benefit of his principal. Any act by an agent in respect to the subject matter of the agency, injurious to the principal, may be avoided by the principal; and where an agent to sell becomes the purchaser, the court will presume that the transaction was injurious, and will not permit the agent to contradict the presumption. (*Id.*)

11. Consequently, where a clerk was employed for one year, at a stipulated salary, as salesman in a carpet store, and during the year his principal ascertained that he had an interest in another carpet store, to which he sold carpets of his principal, although no unfairness or fraud was shown in making such sales: held, that the clerk virtually became the purchaser of the goods he sold, and his interest in the purchases was incompatible with the interests of his principal, and justified the principal in discharging him from his service. (*Id.*)

12. Whenever a person enters into a contract as agent for another, he warrants his own authority as agent, unless very special circumstances, or an express agreement, relieve him from that responsibility. (*White agt. Madison, court of appeals, ante 481.*)

13. Where one pretending to be an agent has contracted as such without authority from the principal, the party contracted with, on learning the facts, has the right to repudiate the contract and hold the assumed agent immediately responsible for damages upon his warranty, without waiting for the time when an action might be maintained on the contract itself. (*Id.*)

14. The damages in such a case are measured not by the contract, but by the injury resulting from the agent's want of power. (*Id.*)

15. If special damages should be incurred

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in consequence of the agent's failure to bind his principal, such as the costs of an unsuccessful action against the principal to enforce the contract, they might be recovered. (*Id.*)

16. If the act of the agent be *fraudulent*, an action for the deceit would lie, but it would be a concurrent remedy with the action on the warranty. (*Id.*)

17. It is a well settled principle of law, that if goods are sold by factor or agent in his own name, without disclosing his principal, the purchaser has a right to *set-off a debt due from the agent* in an action by the principal for the price of the goods. (*Judson agt. Stillwell, ante* 513.)

18. But where the purchaser has *good reason to believe* that the vendor is acting as agent of some other person in making the sale, he will not be entitled to the benefit of a set-off of his demand against the agent. And a mere *general notice*—such as that the purchaser knew by report that the vendor was selling goods for another, or doing business in somebody else's name, or that he was acting as agent—is sufficient to deprive the purchaser of a set-off against the agent. (*Id.*)

19. Where an agent acts under a general power of attorney, giving him power to draw or indorse checks for and in the name of his principal, he has no authority to overdraw his principal's account at the bank. And if an over-draft is made by the agent, through a fraudulent collusion with a book-keeper in the bank, without the knowledge or sanction of the principal, who receives no part of the proceeds, the loss must fall upon the bank. (*Union Bank agt. Mott, 39 Barb.* 180.)

20. Where an agent, on purchasing goods, although disclosing his agency, gives his own notes for the price, which are received by the vendor in payment, the principal is not liable for the purchase money. But where goods are bought by an agent who does not disclose the name of his principal, at the time of the purchase, the principal when discovered, is liable to the vendor on the contract made by the agent. (*McMonnies agt. McKay, 39 Barb.* 561.)

21. An agent appointed to attend a foreclosure sale and bid off the property for the benefit of his employer, has no right to purchase the same in his own name. When an agent thus exceeds his authority, the purchase will be held

to be made for the benefit of his principal, at the election of the latter; even though the agent takes the title in his own name. (*Safford agt. Hynds, 39 Barb.* 825.)

See **NEGLIGENCE**, 4. 5.

See **BANK CHECKS**, 1. 2.

See **CONVERSION**, 1.

See **PARTNERS** and **PARTNERSHIPS**, 11. 12. 13. 14.

RAILROADS.

1. The *common council of the city of New York* have no authority, under the act of the legislature, passed April 6, 1832, entitled "An act to amend an act entitled an act to incorporate the New York and Harlem Railroad Company," passed April 25, 1831, to grant to or permit said railroad company the right to lay or construct a railroad track or tracks in Fourth avenue, Madison avenue, Union square, Broadway, Fulton street, John street, Whitehall street, in the city of New York, or any of them: (*People agt. N. Y. and Harlem R. R. Co., ante* 44.)

2. Because, 1st. Such a route would be an entirely *new and independent route*, as much so as if pursued under independent authority from the legislature, it being in effect a parallel route, which the legislature have in the 16th section of the act of 1831 reserved to themselves the right to grant to a distinct corporation. 2. Nor is the proposed new route in any just sense a *mere extension* of the original railroad, as provided by said act of 1832. (*Id.*)

3. The right or claims of the *city of New York*, or of a *railroad company* running through said city, to the use or privilege of the *streets* of the city, must be regarded as conclusively settled by the *court of appeals* in the case of *The People agt. Kerr* (26 How. R. 258). (*N. Y. and Harlem R. R. Co. agt. Forty-second St., &c. R. R. Co., ante* 68.)

4. The interest which the New York and Harlem Railroad Company have in the *Fourth avenue* of the city of New York is a *right of way*; its franchise consists in its right to lay and use exclusively railroad, subject to the duty of running public cars thereon. It has no control or interest whatever in that part of *Fourth avenue* not occupied by its own road, except that common to the rest of community; that

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is, that it shall be kept free and clear for public use. (*Id.*)

5. Consequently, the said railroad company cannot by action restrain another railroad company from laying a track for public use in Fourth avenue, each side of the plaintiff's railroad, so long as the action of the second railroad company is not malicious, although there may be difficulty of access to the plaintiff's cars by reason of the second railroad. (*Id.*)

6. The signature to a subscription for stock in an alleged railroad corporation which recites that a company had been formed under the general act, and that the articles of association, with the necessary affidavits, had been duly filed, is conclusive evidence of an incorporation against the subscriber. (*Black River, &c. R. R. Co. agt. Clarke*, 25 N. Y. R. 208.)

7. The defendant did not, at the time of his subscription, pay the ten per cent required by ch. 140 of 1850, § 4, but subsequently paid forty per cent: *Held*, that the subscription was thereby made valid. (*Id.*)

8. A common carrier, in consideration of an abatement in whole or in part of his legal fare, may lawfully contract with a passenger that the latter will take upon himself the risk of damage from the negligence of agents and servants, for which the carrier would otherwise be liable. (*Bissell agt. N. Y. Central R. R. Co.*, 25 N. Y. R. 442.)

9. Public policy is satisfied by holding a railroad corporation bound to take the risk when the passenger chooses to pay the fare established by the legislature. If he voluntarily and for any valuable consideration waives the right to indemnity, the contract is binding. (*Id.*)

10. So held, where a cattle dealer paid no independent consideration for the conveyance of himself, but accompanied his cattle, under a contract stating them to be carried at a reduced rate, and providing that "the persons riding free to take charge of the stock do so at their own risk of personal injury from whatever cause." (*Id.*)

11. If he paid, as passenger, the usual fare, without reduction on account of his engagement to assume such risk, the contract would, it seems, not be binding, as without consideration. (*Id.*)

12. The provisions of the general railroad law (ch. 140 of 1850, § 36) do not add to the general responsibility as carriers of the corporations subject to it, nor deprive them of the power to make contracts in regard to such responsibility. Its object was to bring them within the general principle of common carriers. (*Id.*)

13. The bond of a railroad corporation, payable to A. B., or his assigns, is in the nature of commercial paper, negotiable by delivery under an assignment in blank, and not a specialty, subject to equities between the corporation and the person named in the bond as the primary payee. (*Brainerd agt. N. Y. and Harlem R. R. Co.* 25 N. Y. R. 496.)

14. Reiteration of the decisions in *Williams v. New York Central Railroad Company* (16 N. Y. 97), *Carpenter v. Oneida and Syracuse Railroad Company* (24 N. Y. 655), and *Mahan v. New York Central Railroad Company* (*id.*, 658), that the use of a street for a railroad is a new burden beyond the public easement, which cannot be imposed by legislative authority without compensation to the owner of the fee; that such use, without acquiring the title of the owner of the fee, or his licensee, is a continuing trespass, and that he may maintain ejectment to recover the land, subject to the public easement as a highway. (*Wager agt. Troy Union R. R. Co.* 25 N. Y. R. 526.)

15. The rent reserved in a lease executed by the Utica and Schenectady railroad company of a part of its track, being a compensation for the use of such track, the right to it passed, as a necessary appurtenance, to the ownership of the land, and the superstructure upon it, to the New York Central Railroad Company, under the act of April 2, 1853, authorizing the consolidation of certain railroad companies, and the agreement entered into between the several railroad companies in pursuance of it. (*N. Y. Central R. R. Co. agt. Saratoga and Schenectady R. R. Co.* 39 Barb. 289.)

16. Where a railroad company agreed with the plaintiff to furnish the motive power to draw his cars laden with his property, over its railroad, the plaintiff being bound to load and unload the cars, and to furnish brakemen, who were to be under the control of the company's conductor: *Held*, that the

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company assumed the liability of a common carrier, and was liable as such for an injury to the cars or the property of the plaintiff. (*Mallory agt. Tioga Railroad Co.* 39 Barb. 488.)

17. A railroad company cannot use and occupy the soil of the street for its railroad, without the consent of the owner or owners of the fee, or the appraisal and payment of damages to such owners. And there is no distinction in this respect between railroads operated by steam, and those upon which animals only are used as a motive power. (*Craig agt. Rochester city and Brighton R. R. Co.* 39 Barb. 494.)

See BONDS, 1. 2. 3. 4. 5. 6. 7.

See NEGLIGENCE, 4. 5.

RECEIVER.

1. Until an order is made for the appointment of a receiver, the property of an insolvent limited partnership is liable to the execution of a creditor recovering judgment otherwise than by confession, and he may thus obtain a preference. (*Van Alstyne agt. Cook*, 25 N. Y. R. 489.)

2. The execution binds the partnership property, though the action is brought against the general partners only. (*Id.*)

3. Held, accordingly, that, where an action was commenced by one of the partners for the dissolution of the partnership and the distribution of its effects, and before the order for the appointment of a receiver the sheriff levied on partnership property the execution of a creditor who had obtained judgment by default, the title of the creditor to the avails of such property was not overreached by that of the receiver. (*Id.*)

4. The acceptance by a corporation of a charter whereby, upon its committing an act of insolvency, all its property is to vest forthwith in receivers, to be distributed in a prescribed mode, does not give to the transfer thus effected the character of a voluntary conveyance. (*Willets agt. Waite*, 25 N. Y. R. 577.)

5. Held, accordingly, that the receivers of an Ohio bank, organized under such a charter, took its assets in this state, subject to the claims of creditors who had attached them subsequent to the act of insolvency. (*Id.*)

REFEREES AND REPORTS.

1. Where the *report of a referee* is so materially defective as not to pass upon all the issues referred to him, the court at *special term*, although it has the power to send back the report for this reason, will not exercise it, where an *exception* has been taken to the report on this ground. The general term can reverse the judgment and order a new trial on this exception. (*Brown agt. N. Y. Central R. R. Co.* ante 32.)

2. Where the referee has stated the *facts separately* upon which he rests his legal conclusions, the objection that he should have found other *facts* should be reserved for the decision of the *appellate court* upon the case and exceptions. (*Id.*)

3. It is not a *condition precedent* to its validity, that the *report of a referee* be made within sixty days. (*Foster agt. Bryan*, ante 164.)

4. The referee *forfeits his fees* by his neglect to make the report within sixty days; but this is a penalty imposed only on him. (*Id.*)

5. It is the right of either party to proceed as though no report had been made, if it is not made in sixty days. But where both parties wait till the report is made and delivered, without attempting to proceed in the action, the *objection that the report was not made in sixty days, is thereby waived*. (*Id.*)

6. The statute requiring a referee to make his *report in sixty days* after the cause is submitted to him, &c., contemplates that some step shall be taken in the cause *after the expiration of the sixty days*, indicating an intention to disaffirm the right of the referee to make and deliver his report. (*Mantles agt. Myle*, ante 409.)

7. Where neither party take any such action, until the referee has *made and delivered his report*, they waive their right to proceed in the action as if no referee had been ordered. (*This agrees with the cases of Livingston agt. Gidney*, 25 How. Pr. R. 1, and *Foster agt. Bryan*, ante 164.) (*Id.*)

See SUPPLEMENTARY PROCEEDINGS,

1. 2.

See DIVORCE, 1. 2.

See JUDGMENT, 17.

See NEW TRIAL, 7. 8. 9. 10. 11.

12. 13.

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RESIDENCE.

1. The residence of a person, for the purpose of taxation, is where he exercises his political rights, such as voting for public officers, and discharges his political duties, such as paying taxes for the support of the government. (*Hitt agt. Crosby, ante 413.*)
2. And where a person being a single man and having no family, produces evidence tending to show that his residence was in a particular town in another state, during a certain year, it is competent in order to counteract such evidence to show that during such year he did not vote or pay taxes in such town, and that the conduct on his part and the circumstances of his business relations tended to fix his residence in a town in this state where he was assessed and taxed. (*Id.*)
3. Under the act of 1855, (*Laws 1855, p. 44*), non-residents of this state, who are pedlers of goods in this state, are liable to taxation upon the money invested in their business in each town in which they peddle their goods. And if they are actually assessed in more than one town, their remedy is by swearing off the assessments. (*Id.*)

SECURITY FOR COSTS.

1. Where the plaintiffs are non-residents, and there are two or more defendants, they cannot appear separately and each require a bond to him as security for his costs. The statute requires only one bond which should run to "the defendants," and is for the benefit of them all. (*Leffurick agt. Clinton, ante 20.*)
2. The penalty is to be at least two hundred and fifty dollars, and may be required in such larger sum as the court or judge may deem proper. (*Id.*)
3. Whether where one defendant had appeared and procured a bond to be filed, another defendant who had not moved, could except to the surety or obtain a new bond in an enlarged penalty? *Quere?* (*Id.*)
4. The provisions of the Revised Statutes respecting security for costs, are not repelled by the Code. The power given by these provisions to a judge out of court to order security, and to stay proceedings until it is filed, is not taken away by the 401st section of the Code, which forbids a judge out of court to stay proceedings for more than twenty

days, except upon notice to the adverse party. (*Washburne agt. Langley, 16 Abb. 259.*)

SENTENCE.

1. Where an insolvent debtor, previous to his imprisonment on a *ca. sa.* in the county jail, had been convicted of forgery, and under his sentence had served out his imprisonment in the state prison, never having been pardoned: *Held*, that he was thereby disqualified from making an affidavit to his petition for his discharge from imprisonment under the insolvent laws. (*People ex rel. Lord agt. Robertson, ante 90.*)

SERVICE.

1. In the service of notice and other papers in a cause, *made by mail*, the deposit in the post-office is the service, and no distinction is made between notices of trial and any other paper. (*Elliot agt. Kennedy, ante 422.*)
2. A sufficient service is made by a deposit in the post-office, when such service is proper, *at any hour of the day*, without regard to the closing or departure of the mail. (*Id.*)

See TRIAL, 4.

SET-OFF.

1. On a motion to set off, against a judgment for defendant for costs, the costs of an appeal from an order made in the same action after judgment, in favor of the plaintiff, it is in the discretion of the court to interfere or refuse to interfere. Where the objection to such set-off is, that the attorney of the plaintiff has a lien on his costs, and the existence and protection of the lien was important to the securing the services of the attorney, the motion will be denied. (*Purchase agt. Bellours, 16 Abb. 105.*)
2. It is a well settled principle of law, that if goods are sold by a factor or agent in his own name, without disclosing his principal, the purchaser has a right to set off a debt due from the agent, in action by the principal for the price of the goods. (*Judson agt. Stilwell, ante 513.*)
3. But where the purchaser has good reason to believe that the vendor is acting as agent of some other person in making the sale, he will not be en-

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previous demand is only important in equity in reference to costs. (*Bruce agt. Tilson*, 25 N. Y. R. 194.)

3. The statute of limitations begins to run at the time the plaintiff might bring his equitable action, and is charged with notice that his right is denied; a new cause of action cannot be created by a subsequent demand of specific performance. (*Id.*)

4. The vendee being entitled to a conveyance of land, and of a *profit à prendre* in adjoining premises, accepted a deed of the land only, protesting that he relinquished no right. The vendor did not expressly deny the right of the vendee to a further conveyance, but declined then to execute on account of the opposition of his wife. After the lapse of ten years the vendee assigned his claim, and the assignee demanded performance: *Held*, that he was barred by the statute of limitations. (*Id.*)

See *INJUNCTION*, 6. 7. 8. 9.

STATUTE OF FRAUDS.

1. A contract required by the statute of frauds to be in writing, cannot be partly in writing and partly by parol. (*Wright agt. Weeks*, 25 N. Y. R. 153.)

2. Thus, a contract for the sale of land, where the writing fixed the price, but referred to "terms as specified," not in the memorandum, cannot be made good by parol evidence of the time agreed upon for payment. (*Id.*)

3. Whether the vendee can waive any credit and enforce the contract as one for present payment, *quere*. (*Id.*)

4. What is an insufficient memorandum in writing of a contract for the sale of goods for the price of \$50, or more, within the statute of frauds. (*Calkins agt. Falk*, 39 Barb. 620.)

5. The law by its implications, sometimes supplies the want of express agreements between parties, but never overcomes by implications the express provisions of parties. If they are illegal the law avoids them. So, if the meaning of the instrument is uncertain, the intention may be ascertained by extrinsic testimony; but it must be a meaning which may be distinctly derived from a fair and rational interpretation of the words actually used. If it be incompatible with such interpretation the instrument will be

void for uncertainty, and incurable for inaccuracy. (*Id.*)

See *MORTGAGE FORECLOSURE*, 3. 4. 5.

STATUTE OF LIMITATIONS.

1. The time of limitation upon a claim by the plaintiff in a foreclosure suit, against the sheriff for money received on the sale of the mortgaged premises, does not begin to run until the sheriff's deed is delivered, and the sale perfected. A cause of action does not accrue within the meaning of the statute, until the creditor has a right to demand present payment from his debtor. (*Van Nest agt. Lott*, 16 Abb. 180.)

2. An explicit acknowledgment, after coming of age, of a debt contracted in infancy, is not equivalent to a new promise, although it may be evidence from which the jury may infer a new promise. (*Bank of Silver Creek agt. Browning*, 16 Abb. 272.)

3. A party entitled to a conveyance upon request, may bring his action for specific performance without request. A previous demand is only important in equity in reference to costs. (*Bruce agt. Tilson*, 25 N. Y. R. 194.)

4. The statute of limitations begins to run at the time the plaintiff might bring his equitable action, and is charged with notice that his right is denied; a new cause of action cannot be created by a subsequent demand of specific performance. (*Id.*)

5. The vendee being entitled to a conveyance of land, and of a *profit à prendre* in adjoining premises, accepted a deed of the land only, protesting that he relinquished no right. The vendor did not expressly deny the right of the vendee to a further conveyance, but declined then to execute on account of the opposition of his wife. After the lapse of ten years the vendee assigned his claim, and the assignee demanded performance: *Held*, that he was barred by the statute of limitations. (*Id.*)

6. A promissory note given to a mutual insurance company, organised under the general law of 1849, for shares of its capital stock, payable in portions, from time to time, &c., is in legal effect payable on demand, that is, at its date; and the statute of limitations

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begins to run against such a note at the time it is given. (*Colgate agt. Buckingham*, 39 Barb. 177.)

See PARTNERS AND PARTNERSHIPS, 16.

STAY OF PROCEEDINGS.

1. On an *appeal* from an *order of sale and reference*, where a receiver has been appointed and has possession of the property, a *stay of proceedings pending the appeal* will be granted, where it appears the case is soon to be tried on the merits, when a reference may be dispensed with. (*Clark agt. Brooks*, ante 277.)
2. On a *stay* of plaintiff's proceedings, except leave to enter judgment, a notice of the entry of judgment served by him, is in violation of the *stay*, and is a nullity; and of course does limit the time within which an appeal may be brought. (*White agt. Klinken*, 16 Abb. 109.)

See APPEAL, 9.

SUMMARY PROCEEDINGS.

1. Under the act of 1863, amending the Revised Statutes relating to "summary proceedings to recover the possession of land," the *affidavit* upon which the process is issued by the *district courts* in the city of New York must be sworn or affirmed to before the *clerk or his deputy*. If not so sworn to, all subsequent proceedings, with the affidavit, are void. (*People ex rel. Cole agt. Alden*, ante 186.)
2. Where an adjudication is had in summary proceedings by a landlord to recover demised premises, it is conclusive between the parties in any other litigation between them, involving the questions decided. And the finding of the jury in such case, that the relation of landlord and tenant existed between the parties, is conclusive of that relation, in an action for rent of the same premises. (*Kelsey agt. Ward*, 16 Abb. 98.)

See LANDLORD AND TENANT.

SUMMONS.

1. Where a *copy of a summons* is served without any indication on it of a United States revenue stamp—such stamp being properly attached to the original

summons, the action, on motion, will be dismissed for such omission. (*Watson agt. Morton*, ante 883.)

See TRIAL, 4.

SUPPLEMENTARY PROCEEDINGS.

1. A judge of the supreme court made an order in *supplementary proceedings*, that the judgment debtor appear and be examined before a referee. At the appointed time the parties appeared, but the referee was absent. The judgment creditor immediately obtained an order from another judge, appointing another referee and reference: *Held*, 1. That the *first* proceedings were still in force, and the creditor could have applied to the judge who granted that order for the appointment of another referee, or of another time and place for the hearing before the same referee. 2. The judge who granted the *second* order, on motion made to him to vacate it, should have granted the motion. (*Allen agt. Starring*, ante 57.)
2. Whether the *referee*, in the *first* proceedings, on application by the creditor, could have appointed another time for the hearing, and summoned the debtor before him—*Quere?* (*Id.*)
3. Where, on examination of a judgment debtor in *supplementary proceedings*, it appears that subsequent to the service of the order for such examination the defendant has conveyed, by bill of sale, personal property owned by him, to a creditor who claims to be a *bona fide* purchaser for value, the judge before whom the proceedings are pending has no authority to go on and *try the disputed question of title* as to such property. Such title can only be determined by *legal proceedings commenced expressly for that purpose* by a *receiver* duly appointed. (*This decision adds another to a number of others holding the same doctrine*—controlling among them is, *Rodman agt. Henry*, 17 N. Y. R. 482.) (*Teller agt. Randall*, ante 155.)
4. A receiver of property belonging to a judgment debtor, cannot be appointed in a proceeding under § 294 of the Code, before the execution has been returned unsatisfied. (*Darroway agt. Lee*, 16 Abb. 215.)

SURETY.

1. Where a *surety signs an undertaking* in an action of *claim and delivery* of

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personal property, and his sufficiency as bail is excepted to, and he fails to justify, and after the period allowed for the justification has elapsed, and after another surety has been substituted, the plaintiff's attorney *countermands the exception*, the first surety, notwithstanding the countermand, is not liable. (*McIntyre agt. Borst, ante* 411.)

2. A wife mortgaged her land as a continuing security for notes to be indorsed by her husband, or any renewals thereof: *Held*, that an agreement by the creditor to extend the time of payment for the debt due upon such notes, without a renewal thereof, discharged her liability as surety. (*Smith agt. Townsend*, 25 N. Y. R. 479.)

3. The sureties on an appeal from an order made at a special term of the supreme court, which was reversed at general term, are not thereby discharged, but are liable upon the affirmance of the first order by this court, on an appeal to which they were strangers. (*Robinson agt. Plimpton*, 25 N. Y. R. 484.)

4. It is immaterial that the judgment of this court was made the judgment of the supreme court at a special and not at a general term. (*Id.*)

5. The neglect of a creditor, when requested by a surety, to prosecute the principal debtor, discharges the surety, irrespective of knowledge or notice to the creditor of any facts suggesting the probability that delay could prove injurious to the surety. (*Remsen agt. Beekman*, 25 N. Y. R. 552.)

6. A surety who, by arrangement between himself and the principal debtor, takes the primary liability upon himself, may, by subsequent arrangements with third parties, re-establish himself in the position and with the rights of a surety, without the consent of the creditor. (*Id.*)

7. Sureties, after having executed a bond in which their principal is recited as being collector of the town, and as having received, as such collector, the assessment roll of the town for the purpose of collecting the taxes therein named, are estopped from denying the fact that he was such collector. If the collector fails to execute the warrant by returning to the county treasurer all the sums therein directed to be paid to such treasurer, he is *prima facie* chargeable with the amount of the deficiency; and if the sheriff, on a warrant being issued to him for that purpose, by the county treasurer, is not able to collect the deficiency out of the collector's property, the sureties in the collector's bond are *prima facie* liable for the debt. (*Fake agt. Whipple*, 39 Barb. 339.)

See **DEFENCE**, 1. 2. 3. 4.

See **UNDERTAKING**, 5.

See **BILLS OF EXCHANGE**, and **PRO-MISSORY NOTES**, 18.

SURROGATE.

1. A surrogate has no authority to award counsel fees to be paid out of the estate of a decedent, to both of the contesting parties. He can only give costs to the successful party; and they are to be taxed at common pleas rates as they existed in 1837. (*Lee agt. Lee*, 39 Barb. 172.)

See **EXECUTORS AND ADMINISTRATORS**, 1. 2. 3.

TAXES.

1. An action will not lie to restrain the collection of a tax, on the bare ground that the assessment was illegal. There must be, in addition, facts bringing the case under some acknowledged head of equity jurisdiction. (*Susquehanna Bank agt. Supervisors of Broome Co.* 25 N. Y. R. 312.)

2. Where a tax was assessed upon the roll to *Henry D. Van Voorhis*, when his real name was *William H. Van Voorhis*, although he was also known in the town as *Henry Van Voorhis*, *Held*, that he was properly charged with the payment of the taxes. (*Van Voorhis agt. Budd*, 39 Barb. 479.)

See **RESIDENCE**, 1. 2. 3.

See **SURETY**, 7.

See **TITLE**, 4.

TELEGRAPH.

1. Where parties residing in different states, engaged together in business transactions, agree that their communications to each other shall be made by *telegraph*, it is, in effect, a *warranty* by each party that his communication to the other *shall be received*. (*Trevor agt. Wood*, *ante* 451.)

2. A communication is only initiated

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against S., served notice thereof on the factor, and required of him a certificate of the advances for which the factor claimed a lien, and left them in his possession, and he sold them. Assuming the general property of the goods to have been in the plaintiff: (*Wood agt. Orser*, 25 N. Y. R. 348.)

7. *Held*, This was not such an assumption by the sheriff of control over the goods, as the property of S., as to render the sheriff liable to the plaintiff as a trespasser. (*Id.*)

8. The factor having the right of possession, with a lien for advances, the plaintiff could not maintain replevin. (*Id.*)

9. Severing and carrying away, by one act, a growing crop of less than \$25, in value, is no criminal offence, unless charged to have been done maliciously; and if so charged, it is a misdemeanor, as a malicious trespass; but it is not theft. (*Comfort agt. Fulton*, 39 Barb. 56.)

TRIAL.

1. Where, in an action between partners to settle copartnership matters, it becomes evident to the court, on examination of the issues, that the several interests of the parties will, on the trial, involve much contradiction—perhaps questions of veracity—of mistake or fraud in the drawing of the papers, &c., and is manifestly an inquiry which business men, accustomed to examine facts, should decide, the court will direct the issues to be tried by a jury. (*Clark agt. Brooke*, ante 285.)

2. And it is no objection to the granting of a proper application of this kind, that it is not made *within ten days after issue joined*, as provided by a general rule of the court. The court always deviates from the general rules whenever in its judgment a proper case is presented. (*Id.*)

3. Where at the circuit, the court direct that an exception to the dismissal of the complaint be heard at general term in the first instance, it is a mistrial. (*Hoagland agt. Miller*, 16 Abb. 103.)

4. One or more defendants cannot proceed to trial, while the other defendants have not been served with the summons, nor have appeared in the cause. The remedy of the defendants served, is by motion to dismiss the

complaint, if the plaintiff neglects to serve the process on the other defendants. (*Morris agt. Crawford*, 16 Abb. 124.)

5. *Prima facie*, every case tried before a jury, unless otherwise required, is to be determined by them. A court is not bound, without the request of parties, to give any instructions to them; and jurors are presumed to be acquainted with all the rules of law in regard to which the parties do not request them to be instructed, or the court does not instruct them. (*Haupt agt. Pohlmann*, 16 Abb. 307.)

See EVIDENCE, 10. 11.

See SERVICE, 1. 2.

See JUDGMENT OF DISMISSAL, 8. 9.

See CONSTITUTIONAL LAW, 9.

TRUSTEES.

1. An action to recover penalties by "The Board of Trustees of the Fire Department of the Eastern District of the City of Brooklyn," which are authorized to be brought in their own name, under the act of 1860 (*Laws 1860, ch. 473*), must be brought in the *individual names of the trustees, with the addition of their name of office—not by the designation of their official title merely*. (*Trustees Fire Department, Brooklyn agt. Acker*, ante 263.)

2. It is the right and duty of assignees and trustees, to interpose on being informed of proceedings affecting their title to the trust estate; and on failure to do so, they are concluded by the determination made in such proceedings. (*Burr agt. Bigler*, 16 Abb. 177.)

3. Sales and conveyances by trustees, of the trust property, so that the trustees become the purchasers themselves, are voidable, but not void. Such sales and conveyances are capable of confirmation by the express acts of the *cestuis que trust*, by acquiescence, and laches of time. And they are voidable in the equity courts, at the instance of the *cestuis que trust* alone, upon a rule of morality which forbids that a man shall act as vendor for others, and as purchaser for himself, of the same subject matter and at the same time. (*Johnson agt. Bennett*, 39 Barb. 237.)

See MARRIED WOMEN, 4. 5. 6. 7. 8.

See PRINCIPAL and AGENT.

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UNDERTAKING.

- No *undertaking* is necessary on an appeal from the *special term* to the *general term* of this court, to sustain the appeal. (*Niles agt. Battershall, ante 93.*)
- But if a *stay of proceedings* is desired by the appellant, he must either obtain an *order of court* for that purpose, or he must file and serve with the *notice of appeal*, a copy of an *undertaking* as required on an appeal to the court of appeals. (*Id.*)
- Section 348 of the Code, as amended in 1862, providing that no action shall be maintained on undertakings given thereunder while an appeal is pending, applies to undertakings theretofore given, and to appeals theretofore taken, as well as to those thereafter given. It is within the power of the legislature to pass an act which suspends the remedy upon a contract, provided it does not impair the ultimate liability. (*Wolfkiel agt. Mason, 16 Abb. 221.*)

- The perfecting of an appeal from the judgment, and security to stay proceedings, is no answer in bar to an action upon a special bond or agreement to be answerable for the judgment. The last clause of § 348 of the Code, applies only to the class of undertakings therein specified. (*Rice agt. Whitlock, 16 Abb. 225.*)
- Where the promise, in an undertaking, is to the defendant, to return the property if a return shall be adjudged, and to pay him any judgment he may recover, an action may be brought upon the undertaking, by the defendant, without any assignment thereof to him. It is no defense in such an action against the sureties, that the sureties having been excepted to by the defendant, they failed to justify. (*Decker agt. Anderson, 39 Barb. 346.*)

See *SURETY*.

See *INJUNCTION*, 10.

U. S. STAMPS.

- A *notice of appeal* from the judgment of a justice of the peace is not such *original process* as requires a U. S. revenue stamp; and if it does, it may be *amended* by the court, after review, by affixing the proper stamp thereto. (*Jackson agt. Allen, ante 198.*)
- Where a *copy of a summons* is served without any indication on it of a Uni-

ted States revenue stamp—such stamp being properly attached to the *original summons*, the action, on motion, will be dismissed for such omission. (*Watson agt. Morton, ante 883.*)

USURY.

- It is error to submit to the jury, upon a question of usury, whether the first taker of the note in suit sold it as the agent or broker of the maker, such taker having himself advanced money upon the note, and having, in his negotiations with the maker, stated that he should have to charge one and a half per cent. a month for discounting, though he also spoke of procuring it to be discounted for the maker. (*White agt. Stillman, 25 N. Y. R. 541.*)

See *NON-SUIT*, 1. 2. 3.

WARRANTY.

- An action against a *married woman* will lie to charge her separate estate with *damages* which have resulted from her *breach of covenants of warranty* in conveying real estate owned by her. (*Kolls agt. De Leyer, ante 468.*)
- The rule of *caveat emptor* which obtains in the common law, is, in this state, subject to the exception that a warranty of title in the vendor is implied in a contract of sale. But this exception is limited to cases where the vendor is, at the time, in possession of the thing sold. The possession of the vendor is the foundation of the implied warranty. (*Scranton agt. Clark, 39 Barb. 273.*)

See *EVIDENCE*, 13.

See *TELEGRAPH*, 1. 2. 3.

WASTE.

- The reversioner may recover for waste by a tenant, although after its commission he alienate the estate and have no interest therein at the time of suit brought. (*Robinson agt. Wheeler, 25 N. Y. R. 252.*)
- The common-law rule (as stated in *Coke Litt. 53, b.*) is no impediment under our statute. (1 R. S. 750, § 8.) (*Id.*)
- The plaintiff may recover for negligent waste, as in suffering a building to be burnt, although the complaint

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charge the defendant with having wrongfully set fire to it. (*Id.*)

4. The presumption that a deed which has been acknowledged or proved was delivered on the day of its date, is not affected by the statute. (1 *R. S.* 738, § 137.) (*Id.*)

WILLS.

1. The question of fact, whether H. P., deceased, possessed that moderate degree of reason and understanding which is required to enable one to dispose of his property by will, determined in the negative. (*Delfield* agt. *Parish*, 25 *N. Y. R.* 9.)

2. Assuming it to be possible that a testator may manifest sufficient capacity to revoke an existing will, and yet be incapable of demonstrating (although he might possess) sufficient capacity to support the complex provisions of a new will, this notion cannot be so applied to a codicil as to render it effective as the revocation of a will, while void as an affirmative testamentary disposition. (*Id.*)

3. The statute (2 *R. S.*, p. 64, § 43, et seq.,) disposes of the whole doctrine of implied revocations. No expressed intention or wish to revoke a will is effectual, either in itself or as auxiliary to other circumstances, unless authenticated in the modes prescribed by the statute for the making and revocation of wills. (*Id.*)

4. The person propounding an alleged testamentary paper must prove, not only the execution and publication of the instrument, but also the mental capacity of the testator; so that if, upon consideration of the evidence on both sides, the court is not satisfied that the supposed testator was of sound and disposing mind and memory, probate must be denied; but, (*Id.*)

5. At common law, and under our statutes, the legal presumption is, that every man is *compos mentis*; and the burden of proof that he is *non compos mentis* rests on the party who alleges that an unnatural condition of mind existed in the testator. He who sets up the fact that the testator was *non compos mentis*, must prove it. (*Id.*)

6. In law, the only standard as to mental capacity in all who are not idiots or lunatics is found in the fact whether the testator was *compos mentis* or *non com-*

pos mentis, as those terms are used in their fixed legal meaning. (*Id.*)

7. Such being the rule, the question in every case is, had the testator, as *compos mentis*, capacity to make a will; not, had he capacity to make the will produced. If *compos mentis*, he can make any will, however complicated: if *non compos mentis*, he can make no will—not the simplest. (*Id.*)

8. The opinions on that subject of medical men, as well actual observers as experts, are mere evidence, and are to be produced in court, and under oath, as other evidence is. (*Id.*)

9. The case of *Stewart* agt. *Lispenzard* (26 *Wend.* 255) disapproved, and, it seems, overruled; but whether any different rule of law is affirmed, *quere.* (*Id.*)

10. The publication of a will established upon the testimony of one of the attesting witnesses in opposition to the other. (*Trustees of Theological Seminary, &c.* agt. *Calhoun*, 25 *N. Y. R.* 422.)

11. The purpose of requiring the declaration of the testator that the instrument in his will, is to make it certain that he is not procured to execute a will under the supposition that it is some other kind of instrument. The fact that he knew it to be his will may, therefore, be established against the testimony of all the subscribing witnesses. (*Id.*)

12. A will directing the residue of the estate to be divided between his brother William, and the children of his deceased sister Ellen, and the daughter of his brother John, in equal proportions, share and share alike, the distribution is properly made among all the legatees *per capita*—the brother taking the same share with the nephews and nieces. (*Lee* agt. *Lee*, 39 *Barb.* 172.)

13. Where a testator directed his executors to sell certain land, convert it into money, and invest it until the youngest child should become 18 years of age, and then distribute the same among his children: *Held*, this was a case of equitable conversion, and the estate became impressed with the character of personal property, and was to be distributed as such. (*Johnson* agt. *Bennett*, 39 *Barb.* 237.)

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Morrell agt. The Irving Fire Insurance Company; Marble. agt. Whitney.
Crans et al. agt. Hunter; Bascom et al. agt. Smith; St. John agt. Northrop.
McBurney et al. agt. Cutler et al.; Dresser agt. Dresser (35 Barb., 573.).

Reargument ordered.

Payne, executor, agt. Gardner; Scott agt. Rogers et al.
Walton, administrator, agt. Walton, executor.
The Ogdensburg and Clayton Railroad Company agt. Wooley.
Grinnell agt. Stewart (20 How., 478 and 32 Barb., 544.)

Reargument ordered.

Garlinghouse, Jr., agt. Jacobs et al.; De Couval and wife agt. Ray et al.
Everitt et al. agt. Everitt (29 Barb., 112.)

Judgment reversed and judgment for plaintiff with costs.

Superior Court of Buffalo to adjust the amount of the judgment according to the
case agreed upon; Reed agt. The Merchants' Insurance Company; Reed agt.
The Aetna Insurance Company.

Judgment of the General Term reversed and Conviction affirmed.

The People, plaintiff in error agt. Cobel, defendant in error.

Judgment reversed, without costs.

McGregor agt. Buel et al.

Order appealed from reversed, with costs.

The people, ex rel. Bank of America, agt. the Commissioners of Taxes, &c.

*Order of General Term refusing mandamus reversed, and peremptory mandamus
to issue as asked for, without costs*

The People, ex rel. Eagle, agt. Keyser, Register (39 Barb., 587.)

Order reversed, and judgment at Special Term affirmed, with costs.

Clute agt. Jones et al.

Order appealed from affirmed, with costs.

People, ex rel. Harmon, agt. Whitney, Treasurer, &c.

Gillig agt. Maas, impl'd, &c.

*Order of General and Special Terms discharging purchasers reversed, with costs,
and ordered, that purchasers mentioned complete their purchases.*

In the matter of the Protestant Episcopal Public School agt. Davids et al.

Judgment reversed, and judgment of Special term affirmed, with costs.

Robinson et al. agt. Gregory et al.; Ely agt. Cook (9 Abb. 366.)

*Order granting new trial affirmed, and judgment absolute for plaintiff, with costs,
according to stipulations, and N. Y. Common Pleas to ascertain amount due to
plaintiff.*

Burr agt. Horn.

Decisions Court Appeals.

Clark agt. City of Rochester (14 *How.*, 190; 13 *How.* 204, and 24 *Barb.*, 447.)
Freeland agt. Van Campen; Hooker agt. Eagle Bank of Rochester.
Essex County Bank agt. Russell; Martin agt. Supervisors of Greene County.
Hodgson agt. McGregor; Leland agt. Cameron; Same agt. Same.
Weed agt. New York and Harlem Railroad Company; Hathorne agt. Hodges.
Bullard agt. Raynor; York agt. Alden.

Judgments reversed—New trial ordered, costs to abide event.

Harris agt. Murray; Le Fever agt. Le Fever.
Manning agt. Monaghan (1 *Bosw.*, 459); Booth agt. Bunce.
Colwell agt. Bleakley; Ripley agt. Etna Insurance Company (29 *Barb.*, 552.)
Bideniac agt. Smith; Swinburne agt. Swinburne.
Valton agt. National Loan Fund Life Assurance Soc. (19 *How.*, 515 & 22 *Barb.*, 9.)
Fowles agt. Bowen; Butler agt. Murray.

Judgments affirmed with damages assessed.

Kerr agt. Mount, 10 per cent; Bart agt. Kenyon, 10 per cent.
Anderson agt. Nicholas, 10 per cent (5 *Bosw.*, 121.)
Morford agt. Davis, 5 per cent; Robinson agt. Osborn, 10 per cent.

Order affirmed with costs.

Pumpelly agt. Village of Owego (22 *How.* 385.)

Judgment of Supreme Court reversed and decree of Surrogate affirmed with costs.
Robinson agt. Raynor (36 *Barb.*, 128.)

Judgment reversed and proceedings dismissed, without costs.

People, ex rel. Hunting, agt. Commissioners of East Hampton.

Ordered, that the General Term of the Supreme Court be reversed so far as it provides for an amendment of the proceedings, and dismissed in default of such amendment and in other respects affirmed and case remitted to Supreme Court for further proceeding, without cost to either parties, on appeal to the Court.

Stewart agt. Smith (39 *Barb.*, 167.)

Judgment, appeal from, reversed and new trial ordered, unless plaintiff, within 30 days, remit to defendants so much of judgment of Supreme Court as was allowed for interest.

Clark agt. Mayor of New York (24 *How.*, 333.)

Judgment of Supreme Court reversed, and judgments of County Court and Justices' Courts affirmed upon condition, &c.

Brownell agt. Winne.

Order of General Term affirmed and judgment absolute for defendant, with costs.

Pease agt. Christ; Meech agt. City of Buffalo.

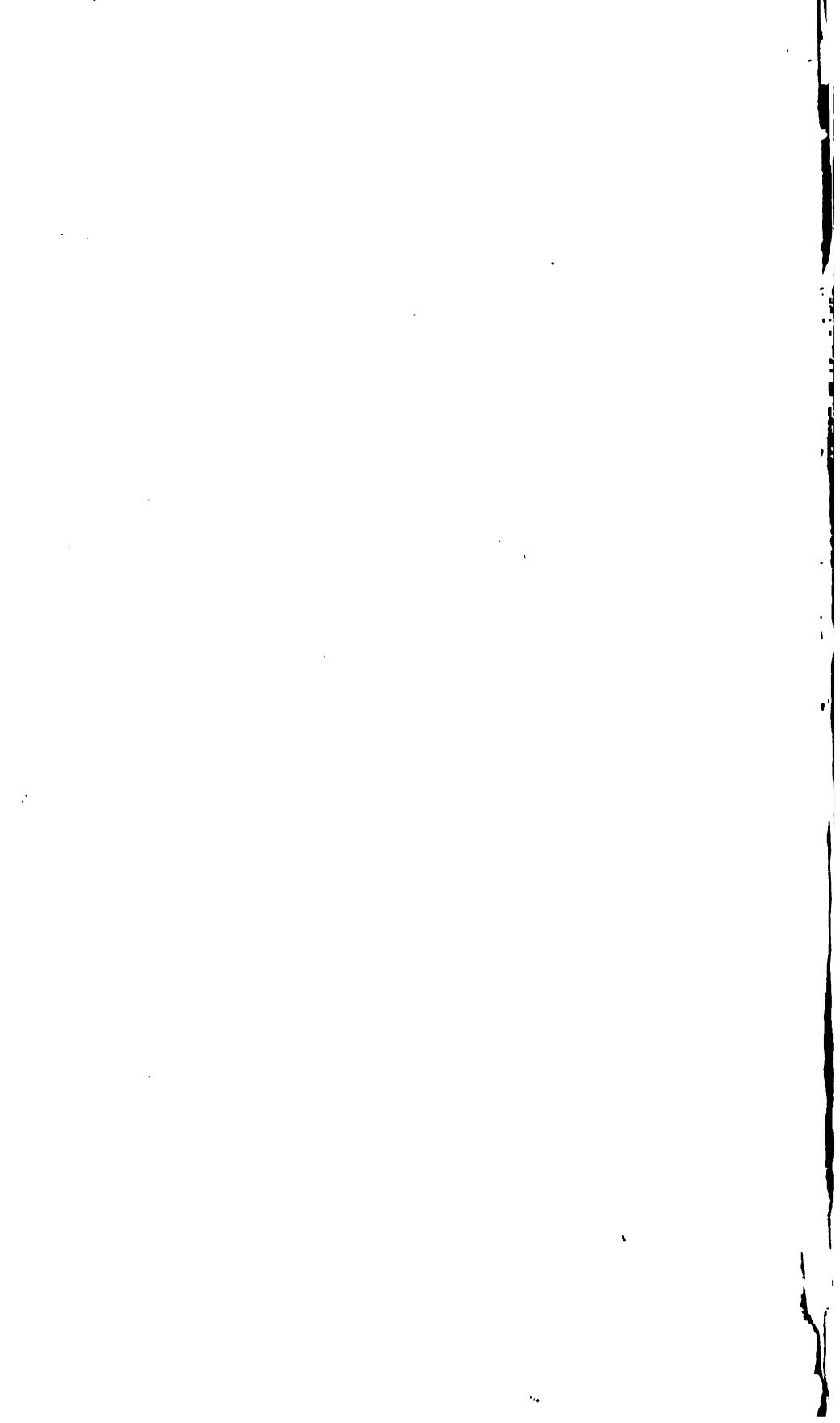
Order of General Term affirmed and judgment absolute against the defendants, with costs.

Long Island Railroad Company agt. Conklin (32 *Barb.*, 381.)
Kitchell agt. Schenck.

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